COMMONWEALTH OF KENTUCKY
ENVIRONMENTAL AND PUBLIC PROTECTION CABINET
FILE NOS. DOW-25904-039 & DWM-25904-039; and
DOW-25924-039 & DWM-25924-039

DAN HULL

PETITIONER

VS. **SECRETARY'S FINAL ORDER**

ENVIRONMENTAL AND PUBLIC
PROTECTION CABINET

RESPONDENT

* * * * * * * * *

THIS MATTER is before the Secretary on the Report and Recommendation of the Hearing Officer. Having considered the Hearing Officer's Report and Recommendation and the parties' exceptions thereto, and being otherwise sufficiently advised, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The Hearing Officer's Report and Recommendation filed on September 15, 2004, is hereby incorporated by reference as if fully stated herein.

2. As to the Division of Waste Management's (DWM's) Notice of Violation (NOV) issued to Dan Hull on June 24, 2002 (NOV Tracking # 4618) Dan Hull is adjudicated to be **GUILTY** of the violations nos. 3/4 (KRS 224.40-100/KRS 224.40-305); and 5 (401 KAR 47:030 Section 2), as cited therein; and **NOT GUILTY** of all of the remaining violations cited therein, which are nos. 1 (KRS 224.50-856 (4)); 2 (401 KAR 47:030 Section 9); 6 (KRS 224.01-405); and 7 (KRS 224.50-410(2)).

3. As to the Division of Water's (DOW's) Notice of Violation (NOV) issued to Dan Hull on June 27, 2002 (NOV Tracking # 4615) Dan Hull is adjudicated to be **GUILTY** of the violations nos. 1 (KRS 151.250/401 KAR 4:060 Sections 2 and 3); and 2 (KRS 224.70-110/401

KAR 5:031 Section 2(1)) as cited therein; and **NOT GUILTY** of all of the remaining violations cited therein, which are nos. 3(KRS 224.70-110/401 KAR 5:055); 4(KRS 224.70-110/401 KAR 5:060); and 5(KRS 224.70-110/401 KAR 5:065).

4. Dan Hull is hereby **ASSESSED** and **ORDERED** to pay a total civil penalty in the amount of eight thousand five hundred dollars ($8,500) for the above violations of which he is adjudicated to be guilty. This is based on the following assessments: for the violations of KRS 224.40-100/KRS 224.40-305 a total of three thousand dollars ($3,000), representing a total of five hundred dollars ($500) for the four piles of predominantly demolition type debris; and two thousand five hundred dollars ($2,500) for the wood waste pile adjacent to Barrs Branch Creek); for the violation of 401 KAR 47:030 Section 2 a total of four thousand dollars ($4,000); for the violations of KRS 151.250/401 KAR 4:060 Sections 2 and 3 a total of one thousand dollars ($1,000); and, finally, for the violations of KRS 224.70-110/401 KAR 5:031 Section 2(1)a total of five hundred dollars ($500).

5. The above-described civil penalties shall be paid within thirty (30) days of the entry of this Order. Payment shall be made by cashier's check, certified check, or money order, made payable to the Kentucky State Treasure. The payment shall reference on its face the captioned file numbers so that proper accounting can be made. The payment shall be mailed to the attention of "Accounts Payable," at the Office of Administrative Hearings located at 35-36 Fountain Place, Frankfort, Kentucky 40601.

6. Dan Hull is hereby **ORDERED,** within sixty days of entry of this Order or as otherwise specified herein**,** to complete all necessary remedial work required to fully abate the above violations of which he has been adjudicated to be guilty. This includes the following:

a). Immediately **CEASE** accepting any new waste material for disposal/placement until and unless a valid permit or registered permit-by-rule is obtained from the Cabinet authorizing disposal of the waste received.

b). Remove and properly dispose of all solid waste on the site/farm. This includes the four debris piles made of predominantly demolition type waste and the separate fill/land clearing wood waste, which is adjacent to Barrs Branch Creek. All of the waste must be disposed of at a permitted facility and receipts showing proper disposal of all waste must be submitted to the Cabinet's Department of Environmental Protection's (DEP's) Florence Regional Office located at 8020 Veterans Memorial Drive, Suite 110, Florence Kentucky 41041-7570.

7. This is a final and appealable Order.

ENTERED this the _____ day of _____, 2005.

ENVIRONMENTAL AND PUBLIC
PROTECTION CABINET

____//S//[08/04/2005]_____
LAJUANA S. WILCHER, SECRETARY

APPEAL RIGHTS

In accordance with the provisions of KRS 224.10-470 and KRS 151.186, appeals may be taken from Final Orders of the Cabinet by filing in Circuit Court a Petition for Review. Such Petition must be filed within thirty (30) days from the entry of the Final Order, and a copy of the Petition must be served upon the Cabinet.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing ORDER was, on this _____ day of _____ 200__ mailed by first-class mail, postage prepaid to:

HON DANIEL HULL
9538 BARRS BRANCH RD
ALEXANDRIA KY 41001

HON DANIEL HULL
4555 BARRS BRANCH RD
ALEXANDRIA KY 41001

and hand-delivered to:

HON RICHARD W. BERTELSON, III
Environmental and Public Protection Cabinet
Office of Legal Services
Fifth Floor, Capital Plaza Tower
Frankfort, KY 40601

_____
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COMMONWEALTH OF KENTUCKY
ENVIRONMENTAL AND PUBLIC PROTECTION CABINET
FILE NOS. DOW-25904-039 & DWM-25904-039; and
DOW-25924-039 & DWM-25924-039

DAN HULL

PETITIONER

VS. **HEARING OFFICER'S REPORT**
AND
RECOMMENDED SECRETARY'S ORDER

ENVIRONMENTAL AND PUBLIC
PROTECTION CABINET

RESPONDENT

* * * * * * * *

I. INTRODUCTION

This matter was initiated by Petitioner Dan Hull's requests for hearings following the Environmental and Public Protection Cabinet's issuance of two separate Notices of Violation (NOVs) charging him with numerous alleged violations of the Commonwealth's environmental laws at his cattle farm in Campbell County, Kentucky. One NOV each, both with multiple alleged violations, was issued by the Cabinet's Division of Waste Management (DWM) and by the Division of Water (DOW) following a joint inspection of the farm by the Divisions on June 18, 2002.

The alleged violations will be summarized in the next section of this report but briefly involve tires, piles of uncovered materials at various locations on the farm cited as illegal open dumps, a small release of "diesel fuel" in an amount below reportable threshold, lead acid batteries, organic wood waste (predominantly off-site land clearing waste) being deposited next to a creek, and a high fecal coliform test result from a water sample taken from a flow or pool of

water near the farm home, which the Cabinet believes is evidence of a point source discharge of human sewage from the home. The primary issues for decision in this matter are whether Mr. Hull is guilty of the violations charged. Multiple distinct factual and legal issues have been raised by the parties as to each alleged violation.

However, as an affirmative defense to all violations, Mr. Hull argues his agricultural operations at the site exempt him from the violations cited because either the particular statute cited contains an express applicable agricultural exemption and/or because all environmental pollution from agricultural operations should be cited/charged under and any pollution enforcement actions must follow the enforcement procedures of KRS 224.71-100 to KRS 224.71-140. This is Kentucky's Agricultural Water Quality Act (KAWQA), which was enacted in 1994. The Cabinet concedes it did not cite Mr. Hull under KAWQA and did not follow its enforcement procedures, including its prerequisites prior to these enforcement actions but argues KAWQA is inapplicable to this case and that Mr. Hull failed to produce or establish his water quality plan thereunder.

In addition, for any violation which Mr. Hull is determined to be guilty, there are additional issues as to the appropriate civil penalty for said violation(s) and the ongoing remediation responsibilities which Mr. Hull should be ordered to perform to abate said violation(s). As Mr. Hull strongly disputes all of the violations, he concedes he has not taken any remedial actions which the Divisions set out in the respective NOVs and has not significantly changed any site conditions relevant to the charged violations since being charged in the NOVs. He strongly believes there are no violations to abate and it is inappropriate for the Cabinet to order any remedial actions prior to hearing.

This matter is currently before the Hearing Officer for issuance of a report and recommendation to the Secretary following a three-day formal administrative hearing and consideration of the parties' respective post-hearing briefs and reply briefs. After careful consideration of the evidence of record in its entirety and after careful consideration of all of the parties' arguments, the undersigned recommends that the Secretary enter a Final Order as follows: i) adjudicate the KAWQA as inapplicable to this case; ii) adjudicate Mr. Hull guilty of the violations of KRS 224.40-100/KRS 224.40-305; 401 KAR 47:030 Section 2; KRS 151.250/401 KAR 4:060 Sections 2 and 3; and KRS 224.70-110/401 KAR 5:031 Section 2(1); iii) adjudicate Mr. Hull not guilty of all of the remaining violations charged; iv) assess and order Mr. Hull to pay a total civil penalty in the amount of eight thousand five hundred dollars ($8,500) for the violations of which he is found guilty; and v) order Mr. Hull to perform the remedial actions necessary to abate said violations.

The Findings of Fact and Conclusions of Law in support of this recommendation follow in Sections IV and V of this report, after first providing in the next section, Section II, further brief background and summary of the charges/responses, and then in Section III of this report a summary of the proceedings and of the evidence presented.

II. BACKGROUND AND SUMMARY OF THE CHARGES/RESPONSES

All violations were cited based on a June 18, 2002 joint inspection by the Cabinet's Divisions of Waste Management (DWM) and Water (DOW). Generally, Mr. Hull believes he has been unfairly treated by the Cabinet. Specifically, Mr. Hull emphasizes there has been no follow-up inspections, the Cabinet took a single unshared sample of the suspected sewage, did not conduct any follow-up to his response to the NOV indicating he has a functioning septic

system, such as a dye test; and that the Cabinet took no samples from the spilled/leaking barrel to actually establish its contents. Mr. Hull argues these are major deficiencies in the Cabinet's case. He also feels the Cabinet has "piled on" the charges.

The inspection resulted from an anonymous call to the Cabinet concerning a dead cow on the property resulting from possible environmental problems/disposal on the farm. Mr. Hull is angered this whole situation arose from an anonymous caller. He believes it is unfair and denies him the right to confront his accusers.

As a result of that call and after some preliminary contacts/meetings between Cabinet personnel and Mr. Hull at the farm on March 22, 2002, and May 30, 2002, which established the parties' significant disagreements and conflicting points of view, the Cabinet obtained an Order from Franklin Circuit Court allowing entry and inspection of the farm.[1]

For simplicity, the alleged violations (12 in total on the NOVs) can be summarized under six different activities or categories, which led to the NOVs' issuance. These are summarized in the following six sub-sections, labeled A-F and include a summary of Mr. Hull's responses to the Cabinet's charges.

A. Accumulation of waste tires on the farm.

Mr. Hull's accumulation of tires on his farm is alleged to be in violation of Kentucky's waste tire program, which is codified at KRS 224.50-850 through KRS 224.50-856. Compliance with the program's provisions, including registration, is required if a person accumulates more

[1] While there was some significant amount of evidence and argument by the parties as to the circumstances prior to the June 18, 2002 inspection and why an order of entry was obtained before the Cabinet conducted its "full" inspection, the undersigned need not address any of those issues, as they are irrelevant to the issues before him in this report. No violations were cited prior to the June 18, 2002 inspection and said inspection occurred as a result of an Order of the Franklin Circuit Court issued pursuant to the authority of KRS 224.10-100(10).

than 100 waste tires and is not otherwise exempt. Mr. Hull claims many of the tires on his farm are "spares" for use on numerous pieces of farm equipment and, thus, are not waste tires at all. See definition of "waste tires" at KRS 224.50-852. He has a tire changer on his farm for this purpose. He claims almost all of the other tires on his farm are being accumulated for other agricultural uses such as to hold down silage covers or to hold large hay bales off the ground to keep them dry and from rotting. He concedes the presence of a few waste tires on the property, which are not appropriate for any purpose but well below the statutory threshold.

The Cabinet argues that unused "spares" are waste tires under the statute, but agrees that accumulation for an agricultural purpose is expressly exempt from the program's requirements. See KRS 224.50-854(1). Thus, as to this violation, the parties are primarily in factual disagreement as to whether the tires are being accumulated for an agricultural purpose, including use on farm equipment. While the Cabinet has an informal standard "we like to see 75 % used for an agricultural purpose within a year" to qualify for the exemption, the Cabinet concedes this is not in the statute and has not been promulgated into a regulation. In fact, the Cabinet's regulations under the waste tire program are codified at 401 KAR Chapter 46 and do not address any of the issues presented in this case as they deal exclusively with the trust funds for the loan and grant programs. Thus, Mr. Hull argues actual use for an agricultural purpose is not required, particularly within any specified timeframe. There is also no definition or limitation of what the possible agricultural purposes/uses may be which are leading to the accumulation.

Finally, Mr. Hull also argues that most of the tires are non-pneumatic and those types of tires are not covered by the law at all. In fact, during testimony he used the term "waste" tires to be pneumatic tires. See III at 35. The Cabinet disagrees and argues the law makes no such

distinction between the types of tires. However, the Cabinet concedes the environmental harm from non-pneumatic tires is less than the harm posed by an accumulation of pneumatic tires given the non-pneumatic type does not trap water as the pneumatic type. This relates to the environmental harm posed by standing water, which can serve as possible breeding grounds for mosquitoes. (The failure to cover solid waste, including the waste tires, or to take other measures to control disease vectors at a waste site or facility is separately charged. That alleged violation is potentially broader than the tire issue as it covers the other alleged solid waste as well. However, the parties in this case focused only on the tires as to the alleged disease vector violation. The undersigned will do the same).

B. Disposal of solid waste on the farm.

This alleged violation concerns primarily, in addition to the tires also cited under the waste tire program at various locations on the farm, construction and demolition type debris, which is deposited on at least five different sites on the farm. One site, admittedly small, is near a trailer, described by Mr. Hull only as an example of "bad-housekeeping." Two other sites are located in valleys/pasture or trenches on the farm which are allegedly used or will "eventually" be used to create a floor/fill area for cattle feeding as "silage trench[es]", as described by Mr. Hull. Mr. Hull describes this material is being collected there as "aggregate" for that purpose. A fourth site is adjacent to the creek and consists primarily of organic wood waste, which appears to be predominately, but not exclusively, from off-site land clearing activities. (By definition this type of waste (land clearing waste) is also considered demolition type debris though it is obviously of different character than the other four waste sites which are composed of structure type demolition debris). Mr. Hull is allowing others to deposit this wood waste material at the

location allegedly in order to fill in an area for later use in his cattle operations and/or to be topsoil in the making. This is the only one of the five sites known to receive any waste from off the farm. (The tires were, of course, also accumulated from off-site sources). As to the relocation of his feed pens, he says he needs to relocate them off the hill where they are now located in order to accommodate his reducing ability to walk up the hill due to his medical problems. Finally, there is a last fifth site, which is of the more typical construction and demolition type debris, which adjoins the wood waste pile. A reasonable inference, based on "guilt by association," is that this debris pile was also partially brought onto the farm because of its association with the admittedly brought in wood waste pile next to it.

The Cabinet alleges this activity is in violation of KRS 224.40-305 (necessity of a permit for operating/maintaining/establishing a waste disposal site or facility) and KRS 224.40-100 (prohibiting open dumps and the act of open dumping without a permit). Mr. Hull does not dispute that he lacks any permits for any solid waste site or facilities at his farm.

In part, he argues his piles of materials cannot meet the definition of "landfill", and therefore, these piles cannot be considered "waste sites or facilities" requiring to be permitted. Mr. Hull also argues the construction and demolition debris is being kept for beneficial re-use and/or is entitled to a "permit-by-rule" under 401 KAR 47:150. For these arguments, he relies on the sites' small size(s) and the type of material which is in the piles, which he keeps for beneficial re-use such as plywood which he states he uses as windbreaks. (He concedes it is too deteriorated for re-use for construction). The asphalt shingles and concrete blocks type materials in the piles he states he uses or eventually will use as the aggregate discussed above to create a floor for his silage trenches. As to the wood waste pile, Mr. Hull argues it is organic material and not "solid

waste" and is being used constructively as fill material for an agricultural purpose. The Cabinet disagrees with all of these factual and legal assertions of Mr. Hull.

C. Failure to take required measures to control disease vectors (mosquitoes) at the waste site

Mr. Hull is cited as being in violation of 401 KAR 47:030 Section 9 for having no cover on the solid waste on his property or for not taking any other control measures to prevent disease vectors from breeding therein. Again, as stated above, consideration of this alleged violation is limited to the tires because of how the parties practiced this case. Mr. Hull argues there is no evidence of any mosquitoes; that most tires are non-pneumatic and are incapable of trapping water, which was discussed in more depth above concerning the alleged waste tire violations, that tires being accumulated for an agricultural purpose are exempt from this substantive performance standard by the statute, at KRS 224.50-860(2), which, as to the tire program, makes such standards applicable only to persons who must register as a waste tire accumulator; and, finally, that he uses application of saltwater as a control mechanism. The Cabinet argues the exemption to the tire program does not exempt waste tires from the performance standards for solid waste disposal.

Thus, the existence of this violation is dependant on or at least related to the existence of the prior alleged violations of disposal of solid waste or maintaining a solid waste site or facility without required permits; or alternatively, an exemption to those permitting requirements which would still impose this particular solid waste performance standard on the tires. In addition, as to the tires, application of this particular solid waste site or facility performance standard would also be made applicable to Mr. Hull under the requirement of KRS 224.50-860 (2), if he is a person

obligated to register his tire accumulation and is not otherwise entitled to the agricultural exemption.

However, while the other two enumerated exemptions to the waste tire program would impose control of disease vectors on an otherwise exempt person with tires accumulated, this language is missing in the agricultural exemption. See and compare KRS 224.50-854 (1) (agricultural exemption to the waste tire program) with subsections (2) and (3), the other two exemptions, which nonetheless require disease vector control even if no registration or other compliance with the waste tire program is required. That language is missing in the agricultural exemption, and by implication, entitlement to the agricultural exemption to the waste tire program also entitles the accumulator to an exemption from disease vector control as to the tires.

Finally, there is also an issue as to whether the more specific waste tire statutes override application of the more general solid waste program to tires, at least as to the extent of any program overlap. As to being required to meet solid waste performance standards for tires, this is a moot issue for persons required to register under the waste tire program since they have to meet those standards anyway under both programs. It is also moot for tires which are simply disposed of since that is also prohibited under both programs as well. However, there would be an issue regarding the maximum civil penalties for any violations of standards, like vector control, because of the differing civil penalty amounts authorized for violations under the two programs.

D. Failure to characterize/correct a petroleum release to the environment

Mr. Hull is cited in violation of KRS 224.01-405 for failure to characterize and/or to correct a release of petroleum or petroleum by-product into the environment. This alleged

violation primarily resulted from a small release from a tipped over 55-gallon barrel of admittedly "diesel fuel."[2] The barrel was intact and closed but has a small bung-hole type opening with a top/lid. After being tipped over, cause unknown, it leaked a small amount of content onto the ground. See photo at 29, Cabinet exhibit 1. The Cabinet did not sample the contents but determined a violation existed based on the material's appearance and odor. Mr. Hull argues this cannot possibly be considered "substantial evidence" sufficient to meet the Cabinet's burden of proof.

In addition, the quantity of the release is unknown but was obviously no more than the barrel's absolute maximum of 55 gallons. There was no evidence as to how filled the barrel was with content when it was acquired by Mr. Hull and no evidence on the quantity remaining prior to the spill or the barrel tipping. The Cabinet did not cite Mr. Hull for any failure to report this release, as there is no evidence the reporting threshold was met. The reporting thresholds are releases of 25 gallons for petroleum or petroleum products other than diesel fuel and 75 gallons for diesel fuel respectively, within a 24-hour period. KRS 224.01-400(11) establishes these reporting thresholds. Since the Cabinet has not promulgated separate regulations regarding characterization and corrective action responsibilities for releases of petroleum, those issues are addressed by KRS 224.01-400(18)-(21). See reference to those sections in KRS 224.01-405 (2) and (3). Mr. Hull argues he cannot be under any responsibility to characterize/correct the release under this statute if the release is below the reporting threshold. Mr. Hull also argues KRS

[2] The Cabinet has also argued the presence of a fuel tanker on Mr. Hull's property, which shows sign of release/staining underneath and also mentions an oil spill on the driveway, but the parties are not in agreement as to whether those items have actually been charged. Finally, the Cabinet is also concerned about an old engine head with a potential for a petroleum release, which has been disposed of on Mr. Hull's property (disposer unknown) but this was not cited under the release statute.

224.01-400 (19) supports his position that he was/is not obligated to do anything concerning this release, even assuming it to be a petroleum based product. The Cabinet disagrees.

However, the parties are also in factual disagreement as to whether this fuel was regular diesel fuel or waste oil as presumed by the Cabinet, obvious petroleum products covered by the statute, or was bio-diesel fuel, which would not be covered if 100% bio-diesel and, thus, in no way petroleum based. Mr. Hull testified it is bio-diesel fuel but did not expressly state its purity or provide any analysis himself. The record establishes bio-diesel may be blended with regular diesel fuel and may range from being 20% of the overall product to 100% biological or non-petroleum based, which is usually labeled on the barrel.

Mr. Hull's testimony is that he purchased this barrel containing bio-diesel fuel which had been contaminated with some vegetable oil at an auction approximately ten years ago at a regular farm auction in London, Ohio. He says he used it over the years for use in a single piece of old equipment ('40s vintage), which was capable of running on very low grade fuel. He says he cut the contents with free cooking oils which he obtained from the schools using a 50/50 mixture. (Given away by the schools due to its expiration date having expired but had not been used). He testified he added cooking oil to the barrel. Thus, this barrel was not obtained from the original producer of the product. Any labeling had been lost over time.

E. Lead acid batteries

Mr. Hull is cited as being in violation of KRS 224.50-410, which prohibits a person from knowingly disposing, discarding, or abandoning a lead acid battery, which is by definition all such methods not expressly stated in subsection (2) as being a proper disposal method. This requires delivery of the battery to a specified person or facility. Mr. Hull has numerous lead acid

batteries at his farm which he testified he uses as part of his farm operations (starting equipment/electrifying fences/operating pumps).

The Cabinet in its post-hearing brief concedes at least the one battery actually attached to the battery charger on the front porch of Mr. Hull's farmhouse is not in violation. See photo at 26, Cabinet's exhibit 1. Mr. Hull argues it is ridiculous to not apply the same logic to the other batteries shown, which are waiting their turn at the battery charger for further use on the farm. However, Mr. Hull concedes that the batteries (6 or 7 of them) depicted in the photo at 27, Cabinet's exhibit 1, are no longer capable of being used but he periodically delivers said unusable batteries to a dealer/battery seller, who allows him to switch them for recyclable usable ones. These batteries are stored in an organized fashion off the ground on other mixed metal waste (mainly radiators), which he testified he keeps and collects in order to sell as scrap. The Cabinet is concerned these batteries are exposed to the elements and believes the photo, from slight discoloration below one of the batteries may have already leaked. However, the Cabinet has not charged any release of hazardous substances, pollutants or contaminants from these batteries.

F. Placing of fill material (wood waste) in or along a stream

Mr. Hull's allowing the wood waste to be placed next to the creek on his farm, in addition to being separately cited under the solid waste statutes and regulations discussed above, is also cited as being in violation of the following three requirements: i) KRS 151.250 and 401 KAR 4:060, which both require a Cabinet permit prior to constructing a fill in or along a stream; ii) 401 KAR 47:030 Section 2 (prohibiting waste disposal in an area that would restrict a 100-year flood, reduce storage capacity of the floodplain, or would likely result in any washout of the waste); and iii) degrading the stream water in violation of the standards established by 401 KAR

5:031 Section 2(1) because of some material actually entering into the stream. The previously discussed engine head may also be part of this alleged violation.

Mr. Hull concedes he does not have any permit for this fill but believes all fills for agricultural operations are exempt from these requirements by the express language of KRS 151.250(3). The Cabinet disagrees.

Mr. Hull also argues the Cabinet has failed to establish, in fact, where the 100-year flood plain is located since the Cabinet failed to perform any computer modeling or other analysis of its location. The Cabinet's response is the fill is directly adjacent to the stream and, in fact, partially into the stream making such analysis unnecessary to prove its case. Finally, Mr. Hull believes it is unfair to cite him for these alleged violations since he believes no environmental problems have actually resulted and given, from his perspective, there is a far more restrictive stream obstruction just upstream - the road culvert placed by the Department of Transportation or county road department.

G. Having an unpermitted discharge (straight pipe or ditch) of human sewage from the farmhouse into the creek

Finally, to conclude this summation of charges against Mr. Hull and the parties respective positions to those charges, Mr. Hull is cited in violation of KRS 224.70-110 and 401 KAR 5:055 which require a permit prior to having a point discharge of a pollutant and further requires that all discharges be consistent with water quality standards; and in violation of 401 KAR 5:065 which establishes the standards which would be applicable for the required permitted discharge. Mr. Hull concedes he has no KPDES discharge permit, but testified that he has a functioning septic system to effectively handle the sewage from his home, which system is located in a completely

different location from the site of the water sample taken by the Cabinet in support of its case. Mr. Hull testified because of the location of the pool which was sampled in relationship to his plumbing it would be physically impossible to be from said plumbing.

Thus, Mr. Hull strongly disputes the Cabinet's factual allegations as to these violations and believes the Cabinet's water sampling was, at least,[3] grossly inadequate and against standard testing protocol (e.g. single unshared sample from a pool of water as opposed to sample from a flow of water; the pool was subject to surface contamination from his cow pasture above and/or from the presence of his dogs in the yard; and insufficient sample size). Mr. Hull responded with his own water sample analysis from the same approximate sampling location, which supports no sewage contamination. Neither party performed any dye testing of Mr. Hull's sewage system.

Mr. Hull also argues there are problems with the Cabinet's intended use of the up and down stream water samples to indicate fecal coliform contribution from his property given the upstream sample was significantly bad and not acted on by the Cabinet and given he testified there are additional properties which drain into the section of the stream between the up and downstream sample points. Thus, he doesn't believe the additional 400 fecal coliform colony count difference in these Cabinet samples can be attributed to being caused from environmental problems associated with his property.

Finally, Mr. Hull argues there is no ditch or drain way from the pool/ditch where the sample was taken to the creek and that the Cabinet inspector concedes the water simply soaked

[3] Mr. Hull actually reports in his post-hearing briefs that he believes it is more likely the Cabinet deliberately contaminated the sample and/or misreported the results of the analysis. Regardless of the sincerity of that particular belief, there is absolutely **no** evidence in support of any such finding. There is also absolutely **no** evidence in support of the Cabinet's implication that Mr. Hull may have "bleached" his sewage prior to the testing performed on his behalf.

into his driveway. Thus, Mr. Hull reasons no discharge into the creek was established from this source.

III. SUMMARY OF PROCEEDINGS / EVIDENCE

This matter was heard in a three-day formal hearing commencing on June 22, 2003, and concluding on June 25, 2003, at the Cabinet's Florence Regional Office of its Department for Environmental Protection. Mr. Dan Hull appeared on his own behalf without counsel. Mr. Rick Bertelson, III, Esq., appeared on behalf of the Cabinet. The undersigned invoked the rule for separation of witnesses. Following invocation of the rule, the Cabinet designated Mr. Justin Schul as its DWM client representative; and Ms. Abigail Rains, as its DOW client representative.[4]

The Hearing Officer briefly restated the parties' respective burdens of proof, as set out in Conclusion of Law Nos. 1-2, below and as previously set out in his previous Orders. Mr. Hull made a brief opening statement reiterating his basic position that this entire matter was unfair and maliciously brought by the Cabinet without the support of any evidence. The Cabinet waived any opening statement. The parties had previously agreed they would waive closing statements following presentation of the evidence and instead would be allowed to submit formal written closing arguments upon a to be agreed upon schedule.

As the Cabinet had the burden of proof to establish the validity of the violations charged and the existence of all factors relied upon in support of a civil penalty assessment,[5] the Cabinet

[4] However, on day three of the hearing Ms. Diana Carrier substituted in as DWM's client representative in replacement of Mr. Schul.

[5] Mr. Hull was given the burden to establish any claims for exemptions, affirmative defenses, and to establish any facts relied upon to mitigate against the imposition of any civil penalties otherwise appropriate.

was required to present its evidence first. In support of its case in chief, the Cabinet called the following six witnesses:

Jonathon "Ray" Prater Mr. Prater is an Environmental Inspector with the Cabinet's DWM working out of its Florence Regional Office. He has almost 13 years' experience in the position and was the Cabinet's lead waste inspector on this matter. He issued DWM's NOV based on his observations of Mr. Hull's farm on June 18, 2002. Mr. Prater has a BA degree in geography from the University of Kentucky.

He testified this matter began with an anonymous call to his office on February 11, 2002. (The call was taken by another inspector who did not testify). The caller expressed concerns about dead cows on the property possibly related to illegal dumping. He testified about his earlier visits/partial inspections of the farm on March 22, 2002, and May 30, 2002. He testified he did not conduct a complete inspection on March 22, 2002, because it was too muddy and he had other planned inspections to make that day. He says Mr. Hull denied access for a full inspection on May 30, 2002.

In response, he swore an affidavit and the Cabinet obtained an order of entry and inspection from Franklin Circuit Court. He admitted the Order did not facially restrict the Cabinet from additional inspections or specify any dates and times for allowable inspection(s). The June 18, 2002 inspection was made under the authority of the Court's Order.

As to his arguable "presumption"[6] that the material from the barrel was a petroleum product, he relied on the dark staining beneath the barrel, its odor, and its oily appearance. No

[6] See Volume I of transcript at 125 where he concedes it could be argued he presumed the identity of the spilled material. There are three volumes of hearing transcript, one for each day, and will be cited herein as I-III to designate the particular volume of transcript referenced.

samples were taken by DWM in support of its NOV even though the Order gave that option to the Cabinet. He made no attempt to quantify the amount remaining in the barrel. He testified about the reporting threshold and conceded it was not reached in this case but further testified that clean up is still required under the statute cited.

In response to questioning/arguments from Mr. Hull, he testified as follows: the waste tire program does not distinguish between types of tires; piles of trash do not qualify for a "permit-by-rule"; and wood waste is still covered waste-even if it is all organic and will ultimately break down.

Finally, in summary as to his testimony for the Cabinet's case in chief, he testified about all of his June 18, 2002 observations. (This testimony establishes that Mr. Prater concluded and still concludes the violations were properly cited in the NOV).

Jim Newman Mr. Newman is employed by the Northern Kentucky Independent Health Department. He has a degree in Environmental Science and Public Health. He is a registered sanitarian and is a certified inspector for the food and lead regulatory programs. He has held his current position for almost 6 years. The Hearing Officer recognized him as an expert in the field of environmental public health. His testimony was limited to the subject matter of mosquitoes, which is part of his job duties. There was no evidence he had ever been on Mr. Hull's farm. He testified mosquitoes are a disease vector linked with several significant human diseases affecting public health such as West Nile virus, encephalitis and meningitis. He testified that mosquitoes breed in standing water and tires are one of the most excellent breeding grounds. Finally, he testified standing water needs to be eliminated for the control of mosquitoes but admitted he was unaware whether they could breed in saltwater.

Arthur R. "Art" Clay, PE Mr. Clay is the recently appointed Manager of DOW's Water Resources Branch, which oversees permitting and enforcement issues under KRS 151.250. Prior to that appointment, he was supervisor for DOW's Dam Safety and Floodplains Compliance Section, which handled enforcement issues of that program. He has a BS degree in civil engineering from the University of Kentucky, which was awarded in 1978. He was recognized as an expert in environmental management as it relates to Kentucky's floodplain regulatory program.

Mr. Clay briefly described the floodplain program and the regulatory terms of floodplain (area which would be inundated by a base flood) and floodway (the limited part of the floodplain/channel that takes most of the water during a base flood). He testified that construction is allowed within the floodplain if permitted or if an exemption is approved by the Cabinet. For exemptions, he testified that a letter of exemption must be approved/issued by the Cabinet even for agricultural exemptions otherwise established by KRS 151.250(3) and that it is the applicant's responsibility to show qualification for any exemption.[7] There is also an exemption for small watersheds with less than one square mile drainage and for subfluvial utility or pipeline crossings.[8] Construction is never allowed within the floodway.

Mr. Clay has not been to the site at issue and admits the extent of the floodway and floodplain of Barrs Branch Creek in the area cited in the NOV are not known. It is not on the

[7] Mr. Clay did not cite any authority in the statutes or regulations in support of the Cabinet's interpretation on the issue of exemptions and need for requesting and obtaining letters of approval from the Cabinet prior to conducting an activity otherwise exempt. He also did not address an interpretative issue raised by the Hearing Officer during the hearing as to whether the agricultural exemption of KRS 151.250(3) is limited to diversions/drainage channels or similar systems constructed to obtain water from the stream for agricultural use of water and would, thus, be inapplicable to fills serving other purposes.

[8] See 401 KAR 4:050 (Construction exemptions). This regulation does not address agricultural exemptions. The regulations do not address procedures for exemption approvals.

existing FEMA maps showing the floodplain as there had been no prior study. While he reports this absence is not determinative of whether there is a violation or no violation, he also concedes the Cabinet has not determined the floodway and floodplain of Barrs Branch Creek in the area cited in the NOV. Mr. Clay concedes the computer simulation modeling/hydraulic study necessary to make these determinations has not been done.

Mr. Clay testified a violation of KRS 151.250 is established because the material has been placed in or along a stream without a permit or letter of exemption from the Cabinet. He further stated the Cabinet would never approve the fill shown by Cabinet's exhibit 1, page 32, because there is no silt control and no measures taken to prevent the material from washing out into the creek, particularly following a rain or flood event.

Mr. Clay did review a topographic map of the area after receiving a call from DOW Inspector Stacy Nichols on June 21, 2002, regarding this area and Mr. Hull's activities. After this review and Ms. Nichols providing him the coordinates of the activity, he concluded there had been no prior study (not on FEMA maps) and that it constituted a violation. In his testimony, he did not specifically address the drainage area/watershed of Barrs Branch Creek but this would have been easily determinable from his review of a topographic map.

As to Subchapter 71 of KRS 224, Mr. Clay testified that he considers that a water quality issue and is not relevant to the work/responsibilities of his Branch.

Finally, while admitting that a restriction upstream may decrease the impacts downstream during any flood event, he testified there would be a backwater impact of the area above the restriction and the actual impact of which would have to be studied prior to permitting.

George Gilbert Mr. Gilbert is an Environmental Engineering Consultant with the Cabinet's DWM. He currently, among other duties, writes technical specifications for the use of waste tires. He has held his current position for approximately five years. Previously he was manager of DWM's Solid Waste Branch. He has a Bachelor's degree in civil engineering from Vanderbilt University, which was awarded in 1974. He has been involved with the Cabinet's waste tire program since its inception in 1992, and was recognized as an expert in Kentucky's regulatory program for waste tires. There is no evidence Mr. Gilbert was ever on Mr. Hull's farm.

He recognized there is an exemption to the waste tire regulatory program for waste tires accumulated for an agricultural purpose. He also concedes there is no comprehensive list of agricultural purposes. He testified the most common agricultural uses with which he is familiar are to hold down tobacco bedding and for use in erosion control, which is an involved usage requiring a significant amount of work. It is not simply placing the tires on a slope. In response to questioning by Mr. Hull, he stated that spare tires not actually being used are considered waste tires under the program but their accumulation for use on equipment would be a legitimate agricultural purpose. He also testified that use of waste tires to hold down silage covers or to hold hay bales off the ground would be legitimate agricultural uses.

He testified such tires, even if qualifying for the exemption to the waste tire program for agricultural purposes, are still considered solid waste and the farmer remains obligated to meet the performance standards of 401 KAR 47:030. This includes the requirement to take appropriate disease vector control measures. He was firm in this testimony even though he recognized the agricultural exemption in KRS 224.50-854(1) does not mention this requirement

and the other specified exemptions do. He testified he is aware of one farmer being cited for this performance standard violation who was actually using the tires for an agricultural purpose.

Finally, as to actual use he testified as follows: "we like to see about seventy-five percent usage a year, as after a period of time goes by, we do want to see evidence of the tires being beneficially re-used." See II at 166. However, he conceded this use requirement is not in the statutes or regulations but is borrowed informally as guidance from the Cabinet's hazardous waste regulatory program.

Mark Jones Mr. Jones is an Environmental Inspector with the Cabinet's DOW who works out of its Florence Regional Office. He has a Bachelor's degree in environmental health science awarded in 1998, from Eastern Kentucky University. Inspector Jones accompanied the lead DOW inspector, Ms. Stacy Nichols, on the Cabinet's June 18, 2002 inspection of Mr. Hull's farm. Inspector Nichols issued DOW's NOV, which was also signed by her immediate supervisor, Mr. Todd Giles.[9]

Inspector Jones testified about his observations made during the June 18, 2002 inspection, which led to issuance of DOW's NOV. He reports he suspected sewage because of a pool of water in the yard associated with what he believed was a man-made ditch. He testified that the water had a greenish tint suggesting the presence of algae, which often is present because of additional nutrients that often are also present in sewage discharges. He said the presence of water was also suspicious given it was dry during the inspection and for the days preceding the

[9] Inspector Nichols and Supervisor Giles were not called as witnesses. The record otherwise indicates Supervisor Giles was not available on the day of inspection and was not present at said inspection. This is why Inspector Jones accompanied Inspector Nichols, who is the inspector assigned to cover Campbell County. However, this also explains why Inspector Jones was not able to respond to Mr. Hull's questions concerning his follow-up to the NOV and the Cabinet's response thereto. Mr. Hull had Ms. Nichols under subpoena but released her after the Cabinet stipulated that it was Inspector Jones who took the water sample at issue. See III at 87-88.

inspection. No other pools of water were observed. Thus, sewage was suspected and was of particular concern to him because he reports Ms. Hull told him children often played in their backyard.

Inspector Jones took a water sample from the ditch where sewage was suspected and additional samples from Barrs Branch Creek upstream and downstream to Mr. Hull's property. (The exact locations of the upstream and downstream samples are not persuasively established in the record and their labels, using Barrs Road addresses may actually be somewhat inaccurate). He testified about his taking and handing of these samples, the Cabinet's chain of custody, and the results from the laboratory analysis, which was performed in-house by DOW's Florence office. He also personally read the growth plates (counted the resulting fecal coliform colonies present) from the samples taken in the creek, but not the one from the ditch, which was read by Ms. Bartley. He is trained to take samples and testified that he took competent samples including from the ditch and these samples were handled without contamination. They were cooled during transportation, as required. He conceded he was unable to obtain a full 100 ml sample from the ditch because of the water's shallow depth but testified it was a sufficient amount for the analysis and that he was able to take a single grab sample at the location, as trained.[10] He admits that composite samples would lead to contamination. The results from the analysis, in numbers of fecal coliform colonies per 100 ml of sample, were as follows: 15,000 from the ditch; 1,700 in the upstream sample; and 2,100 in the downstream sample.

[10] The Hearing Officer accepts this as accurate and disagrees with Mr. Hull's position that the inability to obtain a full 100 ml sample, as done normally, renders this result inaccurate. The concentration of bacteria should be the same as long as the sample is otherwise taken competently and the analysis performed accurately. In the present case, the Cabinet used three different amounts from the samples to produce the plates with 10 ml being the most used for any single plate. The # of fecal coliform colonies per 100 ml was simply calculated by using a multiplier of 10 for those particular plates. Ms. Bartley's testimony establishes this is standard protocol.

However, he concedes this discharge did not reach the creek on June 18, 2002, but simply ran onto the driveway and soaked into the ground. He reports the ground slopes toward the creek and he believes this discharge would be washed into the creek during rain events. He does not report any observations of fecal matter, which he says are sometimes actually seen in such discharges. He testified the Cabinet sometimes performs additional tests and/or dye tests in such cases but not in every case. As to Mr. Hull's quick response to the Cabinet's NOV that he has a functioning septic system, he did not respond because it was not his county. He did testify that it is the responsibility of the owner of the system to demonstrate compliance.

Inspector Jones is not aware of the location of Mr. Hull's septic system but believes the Health department would not approve of a location in front of the house due to its slope and would require it to be located in the back where he observed a more level area. However, the record makes clear that he is not aware of when Mr. Hull's system was installed or the degree of regulatory oversight in place at that time. Thus, the record supports an inference that Inspector Jones assumed the septic system was in the backyard and could be the source of the suspected discharge.

As to the wood waste violations, he testified he observed a: "significant deposit of chipped up wood, sawdust, and other miscellaneous waste products, laying both in and on the bank of the stream located on the property." See II at 203. He testified that he went up to this pile of wood waste and that it lacked any fastening system to keep the waste in place. He testified a wash-out of this waste into the stream would be likely during rain events. He testified that there is a separate pile of waste/junk adjacent to the wood waste pile, which contains waste windows, old doors and some metal. Finally, he also testified that there is an old engine cylinder

head in the stream on Mr. Hull's property, which is likely to release petroleum into the stream causing degradation of the water.

Gretchen Marie Bartley Mr. Bartley is an Environmental Inspector III employed by DOW at its Florence Regional Office. She has almost 15 years' experience as an inspector and is responsible for the office's laboratory, including its quality control program. She is experienced in performing bacteriological analysis using the standard approved EPA protocol. She has a bachelor's degree in geology from the University of Cincinnati.

As to the present case, she actually ran the bacteriological analysis of the water samples which were taken by the Cabinet on its June 18, 2002 inspection of Mr. Hull's farm. These were delivered to her in the office from the collecting inspectors Jones and Nichols. She read the resulting plate from the suspected sewage (sample 1 recorded by the inspectors and recorded by the lab as sample 15-02-0067); and re-read the plates for samples 2 (upstream) and 3 (downstream), following Inspector Jones' initial reading of those plates. The plates were refrigerated following Inspector Jones' initial reading until being re-read by Ms. Bartley.

Ms. Bartley was not present on the farm and did not observe collection of the particular samples at issue, but did testify as to the appropriate sample collection technique for this type analysis. She agrees if the samples are collected badly, the results are not accurate even assuming properly handled and tested thereafter. She established the Cabinet inspectors are trained in appropriate collection and that, specifically Inspector Jones is also trained to read the plates for such analysis. Only grab samples are appropriate, as opposed to composite samples, and the sample should be taken from a flow of water, as opposed to a pool. This is to reduce sources of contamination and other factors which could affect the results. She did testify that

sources of cattle manure and dog feces, if such manure leached/drained into the water being the source of the sample, could contaminate the samples and result in elevation of the coliform bacteria count.

She described coliform bacteria as fairly sensitive to cold and would be killed by exposure to UV/sunlight. There is a great deal of seasonal variation even as to the same natural source and she stressed that a one time grab sample is only a snapshot of the actual situation. She would not necessarily expect samples taken from multiple sources at different times would always show the same ratios because of other variable factors in the watershed. If from a residential source, there is also great variability depending on the health of the residents at any given time, or the residents' recent use of detergents, bleach or chlorine, which could reduce the count otherwise normally present in the discharge.

She gave some brief testimony as to the Cabinet's "straight pipe" initiative to address unpermitted discharges of sewage. This is broader than the so called straight-pipe situations but also addresses unpermitted discharges from failing septic systems. She testified that based on the circumstances found, it is not uncommon to make a citation of a violation based on a single sample with accompanying up and downstream samples if the source is close to a stream. Problems with access and other circumstances would affect whether dye tests would be done. She testified that this is not a program which would require multiple samples or split samples with the regulated person, unlike other programs/regulations.

Finally, in summary, she reported the lab results are definite indicators of fecal coliform contamination which "could be" consistent with sewage from a residence. See II at 314. However, in response to questions from the Cabinet after she reviewed the June 2002

precipitation data from the airport in Boone County, Cabinet exhibit no. 15, Ms. Bartley could not say with any competency whether it was likely/unlikely that the contamination could be from a cow pasture. She specifically mentioned unknowns of slope and ground water regimen at the location. See II at 417-418. During cross-examination by Mr. Hull, she also testified the airport was twenty-five miles from his farm and summer showers are common and often spotty. See II at 419.

In addition to the above witnesses, the Cabinet also introduced the following eighteen exhibits into the evidentiary record:

1. Photographs of Mr. Hull's farm taken on March 22, 2002; May 30, 2002; and June 18, 2002. This exhibit is a binder with 35 labeled pages and includes the title pages from the Cabinet's PowerPoint presentation used during the hearing. Emphasis is on the alleged DWM violations. (The photograph on page 34 was stricken through as withdrawn from this exhibit).

2. Mr. Hull's answer to the Cabinet's interrogatory requesting contents of the barrels, which answer identified the contents of the spilled/leaking barrel as being "diesel fuel."

3. A certified copy of the NOV issued to Mr. Hull by DWM on June 24, 2002.

4. July 11, 2002 letter from Mr. Hull to the Cabinet's Florence Regional Office requesting a hearing to contest the NOV issued by DWM.

5. Corrected excerpts from Cabinet's prior exhibit 1. Four title pages only correcting the erroneous dates. It should be noted that all photographs were taken in the year of 2002. No inspections/photographs were taken in the year of 2003.

6-7. June 18, 2002 photographs of the fuel tanker located on Mr. Hull's farm with the latter two introduced to show staining beneath. (Exhibit 7 has two photographs included).

8. Photographs of Mr. Hull's farm taken on June 18, 2002. This exhibit is a binder with 10 labeled pages and includes the title pages from the Cabinet's PowerPoint presentation used during the hearing. Emphasis is on the alleged DOW violations.

9. Chain of custody record for the water samples taken on June 18, 2002.

10. A certified copy of the NOV issued to Mr. Hull by DOW on June 27, 2002.

11. July 11, 2002 letter from Mr. Hull to the Cabinet's Florence Regional Office requesting a hearing to contest the NOV issued by DOW.

12. Lab analytical results (fecal coliform colonies) for the three Cabinet water samples taken on June 18, 2002. Sample 1 is from a surface pool/flow of water from a ditch near Mr. Hull's home (15,000 colonies/100 ml). Sample 2 is from the creek upstream of his property (1,700 colonies/100 ml). Sample 3 is from the creek down stream of his property (2,100 colonies/100 ml).

13. Lab bench work notes, including notes for the above described samples.

14. Lab bench sheet notes, including a set of notes for the above described samples, which record the colony counts at various amounts of the samples. The last sample results are not relevant to this proceeding and relate to another site. The reference to the 10 ml plate for sample 1, relabeled 15-02-0067 in the lab, indicates the plate had "too many [colonies] to count" or "TNTC."

15. Certified copy of precipitation data from the gauge located at the Cincinnati/N. Kentucky regional airport for the month of June 2002.

16. Information regarding mosquito control obtained from the Kentucky Department of Agriculture's web page.

17. August 18, 2002 letter from Mr. Hull to the Florence Regional Office.

18. August 20, 2002 letter from Mr. Hull to his state senators and the Kentucky Farm Bureau, regarding his request for administrative hearing on these matters.

Mr. Hull next presented his case in chief and called the following four witnesses:

Mark Leopold (Mr. Leopold was called out of order following Mr. Newman's testimony in order to accommodate his schedule and was, thus, called by Mr. Hull prior to completion of the Cabinet's case-in-chief). Mr. Leopold is an agricultural specialist employed by Northern Kentucky University since 1999. In addition, he has a service contract with Campbell County as its water quality specialist. He was awarded a degree in agronomy from the University of Kentucky in 1980 and was employed there as an agricultural specialist thereafter until his employment with Northern Kentucky University. Mr. Leopold has been to Mr. Hull's farm

multiple times, including at least one visit related to an application for cost share funds which Mr. Hull was pursuing.

On January 9, 2003, Mr. Leopold took five water samples on Mr. Hull's behalf, including samples at three locations which were directed to him by Mr. Hull to be sampled. Mr. Leopold had called Mr. Hull around lunch that day to advise him he would be there that afternoon to take the samples, which they had previously discussed. Mr. Leopold delivered these samples to a certified laboratory and received the analysis back from said lab. He explained the sample in the ditch behind Mr. Hull's house was not a single grab sample from a flow of water as preferred, but was rather a composite sample due to the small quantity of water depth in the ditch. (Mr. Hull has obviously assumed the Cabinet had a similar sampling problem but this is not established).[11] Finally, after having the Cabinet's water sampling process described to him, including being based on a single unshared sample, he opined there existed "other processes that could have been more quantitative", I at 208, and he observed no "lush vegetation" which would be associated with nutrient discharge in the area of the ditch and which also typically accompanies sewage discharges.

Kuljindeu Sandhu (Ms. Sandhu was called out of order following Mr. Leopold's testimony in order to accommodate her schedule and was, thus, also called by Mr. Hull prior to completion of the Cabinet's case-in-chief. Ms. Sandhu, though a Cabinet employee, appeared under subpoena issued by Mr. Hull).

[11] The record supports a finding the Cabinet's sample was a single grab sample, but the record is not persuasive that it was from a flow, as opposed to a pool. (Inconsistent references by Inspector Jones during his testimony with some references to the source of the sample as being a pool of water). A standing pool may be more subject to contamination from other sources, but the exposure of a pool to sunlight would also tend to reduce the viable count.

Ms. Sandhu is an Environmental Inspector with the Cabinet's DWM working out of its Florence Regional Office. She is Mr. Prater's direct supervisor and signed off on DWM's NOV in that capacity. She has been on the farm twice but reports seeing no crops or cows - but admits she doesn't know cows' habits. The first time she was on the farm was May 30, 2002, when she testified the Cabinet was denied access for an inspection. She subsequently reports a call from Mr. Hull to her office, in which she felt Mr. Hull was verbally abusive and in which she reports Mr. Hull called her a terrorist. She provided an affidavit in support of obtaining an order of entry and inspection from Circuit Court, including authority for a peace office to accompany the inspection.

Her second and last visit to the property was the June 18, 2002 inspection which led to issuance of the NOVs. She testified the June 18, 2002 inspection started around noon. She testified that there were piles of trash everywhere on the property which she believes constitute illegal open dumps. She said there was no cover over any of the piles and they could not be considered to be "landfills," which is argued by Mr. Hull. However, she was equivocal about whether piles of wood constitute a violation indicating it depends on the amount and what else is in the wood. See I at 247 and 249. As to there being a floodplain violation, she relied on DOW. As to the shingles, she reports they are of particular environmental concern due to asbestos, but was unsure of asphalt shingles. She did say a "permit" was required for an activity regulated by a "permit-by-rule." See I at 278.

She concedes there was nothing serious enough to warrant sampling/testing and presumed the leaked material was waste oil based on appearance. See I at 224, 226, 306, and 308. During other testimony she reports she is unsure why there was no sampling. Id at 230. She is unsure of

the residual amount remaining in the barrel and made no effort to check it but reports the ground appeared to be saturated. Thus, she couldn't determine the amount of the material which had leaked. Finally, as to the petroleum release issues, she reports the reportable quantity is 25 gallons in a 24-hour period, but was unable to testify as to the amount needed to be released in order to trigger characterization responsibilities under the statute. See I at 300-301.

As to the tires, she testified that she did not observe any being used for an agricultural purpose but conceded spare tires are a legitimate agricultural purpose, but would expect those to be rimmed. She testified she saw some tires entrapping water but concedes non-pneumatic tires would not be able to trap water. She was unable to quantify the percentages of the two types of tires located on Mr. Hull's property.

Finally, she testified the Cabinet did not conduct another inspection of the property because the Cabinet did not want to get another order of entry and inspection.[12]

William Covington "Bill" Burger, II (Mr. Burger is also a Cabinet employee who was called by Mr. Hull under subpoena and was taken out of order to accommodate the witnesses' schedule. Thus, his testimony was also taken prior to completion of the Cabinet's case in chief).

Mr. Burger is the Branch Manager of DWM's Field Operations Branch. In this position, he is responsible for supervising all regional field offices and personnel from the Division's central office in Frankfort. He has held his current position since June of 1999 and has been employed by the Cabinet from July of 1977. He received a Bachelor's degree from the University

[12] Mr. Hull later moved to recall Ms. Sandhu for additional testimony for his case in chief. The Cabinet strongly opposed this request. The undersigned overruled the request after providing Mr. Hull an opportunity to state the questions needed in additional examination believed necessary. Following that explanation, the request to recall was denied by the undersigned as being cumulative and unnecessary.

of Kentucky in 1973. He was involved with the drafting and implementation of KRS 224.01-400 and has a long history of experience with the Cabinet's Environmental Response Team.

Mr. Burger testified he first became aware of Mr. Hull from a phone conversation with Ms. Sandhu following the Cabinet's attempt to make the May 30, 2002 inspection of Mr. Hull's farm. Mr. Burger is Ms. Sandhu's supervisor and was responsible for hiring her. Mr. Burger testified that Ms. Sandhu called because she had felt threatened and abused by Mr. Hull and that Mr. Hull called her a terrorist. Mr. Burger testified it is routine practice for the Cabinet to obtain an order of entry and inspection whenever Cabinet personnel were threatened or perceived to be threatened. It is also routine to make these inspections sufficiently thorough and to obtain the authority to sample, if needed, in order to avoid the need for any follow-up. Mr. Burger says this limits the potential for any additional unnecessary confrontation and is best for all parties.

He accompanied the Cabinet on the day of the June 18, 2002 inspection and reports Mr. Hull arrived about twenty minutes thereafter and was given a copy of the Court's Order of Entry and Inspection. Mr. Burger testified that Mr. Hull exhibited signs of physical disability upon his arrival and even offered to call assistance for him. Mr. Burger was not there to supervise the inspectors. Thus, during the inspection Mr. Burger did not accompany the inspectors but stayed in the shade with Mr. Hull and the accompanying state trooper. He testified the Cabinet was there about five hours. During this wait, there was some limited discussion between Mr. Burger and Mr. Hull about the substantive issues relating to the inspection. Mr. Hull reported to him that he had a cattle operation. Mr. Burger has familiarity with agricultural operations and reports he observed obvious signs of an active cattle farm.

As to testimony about the alleged violations, Mr. Burger's testimony was predominantly limited to reviewing the photographs of record and expressing the Cabinet's positions about the issues presented in the case. As to the materials/locations involved in the alleged violations on June 18, 2002, he did not personally observe those sites with the exception of the pile of wood waste deposited next to the creek. He also observed some of the tires on the property but his testimony did not otherwise or significantly address the tire issues. He did not address the lead battery issues at all during his testimony.

As to the wood waste, he reports Mr. Hull told him it was chipped wood waste and other wood waste including some which had been delivered to the property by others in the business of doing that type of work. Mr. Hull said it was being used for composting to obtain topsoil and/or to be used as fill to channel the stream and to build up a low area to allow for cattle feeding operations at the location. See II at 36-38; and 84. Mr. Burger testified that this disposal could not meet the definition of "composting" under the statutes since the term does not include exposure of such material under uncontrolled conditions and, in addition, this type of unprocessed material would take near geologic time to break down, particularly without any further handling or management. Mr. Burger reports he observed no signs of any handling or management of this wood waste. He also testified that depositing such material from off site would not qualify for a permit-by-rule but would constitute disposal. See II at 39 and 99. Finally, as to the wood waste, he reports that the material, as placed, is likely to act unpredictably and be washed out into the stream. See II at 98. He reports observing some of the wood waste actually in the stream channel. Thus, he testified the material is in the floodway/channel and by definition this is part of the broader 100-year floodplain.

As to the "petroleum release," Mr. Burger stated he is familiar with bio-diesel, which is a renewable resource made from vegetables oils and/or animal fats and rendered into a material similar to a petroleum product. However, he testified bio-diesel is not always petroleum free and often comes in blends with regular diesel fuel # 2. A pure bio-diesel fuel (labeled B-100 indicating % of bio product) would be distinguishable from regular diesel fuel from its odor. There is no evidence Mr. Burger was close to this alleged release/barrel and, thus, no evidence he personally smelled the substance at issue. He did not address whether the substances could be distinguished on the basis of appearance. He did testify about the interaction between KRS 224.01-400 and KRS 224.01-405, and said there is no minimum amount of material released in order to establish a legal duty to characterize/correct the release even if the amount released is under the reporting threshold. As to KRS 224.01-400(19), Mr. Burger reports it does not apply if further action is requested by the Cabinet. See II at 54. He testified that the Cabinet routinely asks for characterization/correction of releases if the Cabinet observes signs of "standing and spillage" of a suspected petroleum substance based on its odor and appearance. See II at 97.

Mr. Burger also saw the tanker truck on Mr. Hull's property, Cabinet exhibit 6, and believes Cabinet's exhibit 7, which is a photograph of said truck with some staining underneath, establishes a release from that source as well. He did not remember what Mr. Hull said was in the truck. Finally on this alleged violation, he admits DWM did not take any samples from the stained soils, the barrel, or the tanker and that the remedial on the NOV simply requires Mr. Hull to remove and properly dispose of all waste oil and provide disposal receipts.

Finally, Mr. Burger's testimony also addressed the additional piles of materials as depicted in Cabinet's exhibit 1, pages 21-22. He did not personally view these piles during the

inspection and testified based solely on the photographs and some hypotheticals presented to him by Mr. Hull by his questioning. In summary, Mr. Burger opined this pile of debris constitutes an illegal open dump and would not qualify for a "permit-by-rule" within the regulation 401 KAR 47:150 relied upon by Mr. Hull. He testified that one basis of denial of such status is the failure to meet the performance standards which is required by the regulation. One standard is to provide cover and there is no cover provided to this material at all. Cover is used to fill the gaps/voids and is necessary to prevent access for disease vectors. Even construction and demolition debris from on site demolition and material stored for later beneficial re-use would need to meet basic cover requirements to qualify, he said. He also reports seeing no evidence of beneficial re-use in the photographs but conceded he has heard of asphalt shingles being used in other states as a possible aggregate for road surfaces. He also conceded that plywood could be beneficially re-used if kept for reconstruction and not deteriorated. Finally, he has knowledge of silage trenches but rejected Mr. Hull's suggestion in questioning that these photographs depict a silage trench concluding, to him, it appeared to be an open dump.

Dan Hull Mr. Hull is a cattle farmer who was born in 1937. He lives on the farm with his wife in a farmhouse which was built before electricity came to rural Campbell County. The farmhouse has been his home since 1958 and he has raised his children there. He mentioned a son and a daughter. In addition to his farm work, he currently works part time at a lawn mower shop. He has previously worked as a mechanic around forklifts and has done bulldozer work, including the construction of farm ponds. He is a self-described "auction addict" who is always looking for a bargain and doesn't believe in wasting anything which can be used. Those self-descriptions are credible.

He testified his farm income last year was limited to $7,000.00, which he obtained from the sale of half his herd, which is now down to 100 head. He reports because of that sale he will not have any additional farm income for the next couple of years. The record does not otherwise expressly address Mr. Hull's income or resources.

Mr. Hull testified about his farming operations and the use or intended use of the materials at issue in those operations. He admits his farming operations are less heavily operated than in the past since he got hurt but doesn't explain what his medical problems are other than they prevent him from sitting for any length of time. He stands even when driving his tractors but with one exception his old equipment allow him to do that. (He did stand throughout the formal hearing).

He testified that he does have an agricultural water quality control plan, which is on file with the appropriate authority, but that he lacks a copy of it.[13] In general, he testified that: "we have tried to be environmentally friendly." See III at 30. He also exhaustively addressed the Cabinet's alleged violations one by one and testified about the facts he relies upon as being relevant to each. Many of those facts are mentioned in the above summary in Section II of this report and will not be restated in this section. However, a few additional points should be summarized from Mr. Hull's testimony.

Mr. Hull testified that Inspector Prater inspected the site once in the year 2000 on a similar complaint and determined there were no violations. (Inspector Prater had testified he does not remember any prior inspection of the farm and Mr. Hull did not address this issue

[13] Counsel for the Cabinet continually emphasized he had requested a copy of Mr. Hull's plan during discovery.

further in his rebuttal). Mr. Hull admits he is not good with remembering names but claims he is good with remembering faces.

As to the tires, he testified that he has accumulated all of the tires for agricultural purposes, including for use as spare tires on his numerous pieces of farm equipment. The pneumatic tires are accumulated to be spares and used on the farm equipment. Once no longer usable for that purpose he testified that he tags them to avoid mistaking they are still usable as a spare and puts them aside for possible other uses, primarily to hold up his round bales of hay to keep them off the ground or to cut the sidewalls out for use in above-ground gardening for strawberries/vegetables. It must also be noted that to him, "waste tires" are pneumatic tires only and only when they are no longer usable for spares. This distinction must be kept in mind in reviewing or consideration of his testimony. He doubts he has 100 of these types of tires on his farm.

He does not consider solid/forklift tires, which he primarily uses to hold down plastic covers over his silage pile(s) for storage, as being covered by the waste tire program.[14] He testified he accumulated these non-pneumatic tires from his days when he worked around forklifts. He also welds these tires together, which are rubber over steel, to make culverts, as needed. He says the inspectors had to walk over two such culverts during their inspection. However, as to actual usage, he testified it varies depending on the time of year (cycle which he

[14] He testified that he will also use waste pneumatic tires for this purpose, but only if they are in relatively good shape and not ragged on at least one side, given they otherwise tend to tear or rip the silage cover. He testified that it is important to keep the silage airtight to avoid spoilage. This is why he says Mr. Gilbert's testimony as to the number of tires needed to cover tobacco is inapplicable to his usage, which requires more tires. Generally, the level of detail provided by Mr. Hull as to his farming operations makes his testimony credible and convincing on these issues.

is in on the farm) and from year to year, depending on things like the weather and the degree of hay production the weather allows and other factors.

Finally, as to the tires, he testified that the non-pneumatic tires do not trap water. As to the few large pneumatic tires which do trap water he uses calcium chloride salt water for mosquito control to avoid being subjected to the mosquitoes himself.

The other waste issues and the batteries were sufficiently summarized in the above section and will not be repeated, except to note additionally that Mr. Hull indicated the Cabinet's photographs of the wood waste pile next to the stream only showed the edge of the pile and that the level area of the fill was not shown, including an area where trucks are actually parked on it. This testimony was in response to Cabinet questioning that no cows could stand on the material shown in the photographs.

Finally, as to the sewage issue he testified that he has a functioning septic system that has never presented any problems and that it is located in a completely different area than the Cabinet assumed. He emphasized that because of the location of his plumbing it could not be the source of the high fecal coliform count in the Cabinet's sample and that there are other sources of contamination possible. These include a cow pasture in the drainage above the site, which he says had 150 head in it at the time of the inspection; and dogs with access to the area.

In addition to the above witnesses, Mr. Hull also introduced the following ten exhibits into the evidentiary record, labeled 1 through 11, as tendered exhibit 6 is in for purposes of avowal only:

1. Chain of custody record for the five water samples taken on January 9, 2003, by Mr. Leopold on behalf of Mr. Hull. The first three sample locations are roughly comparable to the sample locations sampled by the Cabinet above.

2. Lab analytical results (fecal coliform colonies) for the five water samples taken on January 9, 2003. Sample 1 is from a surface pool of water in Mr. Hull's ditch near his home (4 colonies/100 ml). Sample 2 is from the creek upstream of his property (103 colonies/100 ml). Sample 3 is from the creek down stream of his property (15colonies/100 ml).

3-4. Photographs of tires on Mr. Hull's farm.

5. Information received by Mr. Hull from the Department of Fish and Wildlife Resources concerning the possible uses of tires as fish shelters in ponds.

6. Material data sheet from Griffin Industries concerning its "Bio-100" diesel fuel product made from fatty acid methyl esters. This is in only for avowal purposes given it is not relevant to what's in the barrel which spilled/leaked. While Mr. Hull testified he does obtain this product for use on the farm, he was also candid that this is not what's in the specific barrel at issue, which came from another source.

7. Letter from the Campbell County Conservation District acknowledging receipt of Mr. Hull's agricultural water quality plan and/or self-certification. See KRS 224, Subchapter 71.

8. Mr. Hull's application for cost share funds.

9. Information concerning mosquito control obtained by Mr. Hull indicating, they have a limited flying range.

10. One page informational sheet from the Kentucky Department of Agriculture regarding steps which should be taken to assure bio-security for the farm.

11. One page (of 4 pages) from University of Kentucky's Entomology Department web page concerning Kentucky mosquitoes and their control.

It should also be noted that Mr. Hull brought with him to the hearing the barrel at issue as to the alleged petroleum release violation and one of his non-pneumatic or "fork lift" type tires, as he describes them. These were brought into the hearing room by use of a hand-truck and used for demonstrative purposes during his examination of some of the witnesses. The Cabinet stipulates it is the barrel at issue but not as to it being in the same condition as it was on June 18, 2002. These items were not introduced into evidence.

Following Mr. Hull's completion of his case in chief, the Cabinet re-called Mr. Prater for brief rebuttal testimony on the sole issue of the alleged waste tire violations. During his direct examination on rebuttal, Mr. Prater emphatically testified that there are more than 100 waste tires which could entrap water on the farm. In his follow-up cross-examination by Mr. Hull, it was established that most of the tires in the various piles, with the exception of the one pile near the tire changer, were of the solid-non-pneumatic type and are unable to trap water. The Cabinet rested following this rebuttal testimony.

For the reasons stated in the record, Mr. Hull was denied his request to recall Ms. Sandhu for additional testimony. This ruling was again noted for appeal purposes. As Mr. Hull sought no further testimony except for Ms. Sandhu, the evidentiary record was closed.

Pursuant to agreement, a post-hearing briefing order was entered into, which commenced following completion of the hearing transcript. The deadlines were subsequently extended. Both parties have now timely filed their respective briefs for their cases in chief and both have timely filed their respective reply briefs. Thus, the record is closed and this matter is now under submission for issuance of this report and recommendation to the Secretary. The Hearing Officer after carefully considering the evidence of record in its entirety and all of the arguments of the parties makes the following Findings of Fact and Conclusions of Law.

IV, FINDINGS OF FACT

After carefully considering the evidence of record in its entirety, the Hearing officer hereby makes the following Findings of Fact:

General facts

A. The parties and procedural history

1. The Cabinet, formerly the Natural Resources and Environmental Protection Cabinet, is the administrative agency charged with the statutory responsibilities of protecting the Commonwealth's air, land, and water resources pursuant to the authority of KRS Chapters 151 and 224 and the regulations promulgated pursuant thereto.

2. Mr. Dan Hull is a resident of Barrs Branch Road in Campbell County, Kentucky. Mr. Hull is engaged in cattle farming at this location and resides with his wife in their farmhouse at this same location. Mr. Hull's farming operations at this location are "agricultural operations" as defined by KRS 224.71-100(1) and the KAWQA. The Cabinet did not proceed against Mr. Hull under the KAWQA or follow its prerequisites for enforcement actions against a covered agricultural operation, as those are set out in KRS 224.71-130. Generally, these would require prior notice with a copy to the conservation district and a reasonable period for compliance prior to labeling the farmer a "bad actor" and thereby making him subject to the imposition of civil penalties for violations. The Cabinet argues KAWQA does not apply to the charged violations.

3. As to Mr. Hull's agricultural operations, he maintains a herd of cattle for beef production, which ranges in size from 200 head to its current level of about 100 head. His base farm, the property at issue, is about 100 acres and is predominantly hillside. However, his agricultural operations are broader than his base farm and include his mother's farm which adjoins his (140 acres); and, at least, an additional two farms he rents which are respectively a mile and two miles away from his base farm. He does cultivate about 30 acres of corn at one of those away sites. This is chopped into silage and stored at the base farm. He also produces hay for cattle feed and annually usually produces about 450 of the round bales. The cattle are summered pastured away from his base farm and moved to his base farm around Christmas for

winter feeding. The record does not establish when he normally moves his herd to summer pasture but the herd was still present on June 18, 2002, when the Cabinet inspected the farm.

4. Mr. Hull believes himself to be a good environmental steward. He has developed an agricultural water quality plan and/or self-certified compliance with the applicable statewide plan. See Hull exhibit no. 7. He does not waste water and he does not waste other materials, which are traits that have carried over from his childhood.[15] In fact, the record, as a whole, also supports an inference that he believes virtually all material is subject to being usable for some beneficial purpose, at least if not presently - at some unknown time later. His home is heated with 100% wood, including material/kindling from the piles at issue, and the home is not on any public water supply. He relies on a cistern which is located under his front porch and near the site of the Cabinet's sample location 1.

5. Mr. Hull believes that agricultural operations are generally exempt from the Commonwealth's environmental laws, including those regulating solid waste, as long as he applies best management practices as required by KAWQA and as explained in the Producer's Workbook (PW) under KAWQA.[16] See statement in Mr. Hull's reply brief at 21: "disposal of garbage on the farmstead IS allowed." He cites the PW at 47 for authority, which concerns the best management practice (BMP) # 1 dealing with solid waste on the farm. See also his reply brief at 37. This publication is somewhat ambiguous on this issue and can be selectively read to imply that solid waste can be disposed of on the farm as long as it is not placed into sinkholes or

[15] After explaining his childhood with examples of bucket baths, he testified as follows: "So, we learned not to waste anything, and this is what we do out on this farm. We don't waste anything. We don't waste batteries--we don't waste oil--we don't waste nothing. We use everything--two, three, four, five, six times--if there is any way." See III at 157. The Hearing Officer specifically finds this testimony credible.

[16] This is published by the Cabinet's own Division of Conservation (1/1/97) and is to be a "companion document" to the Kentucky Agriculture Water Quality Plan, itself. See PW at 122.

in other areas that would have water draining through the waste. See PW at 47. See also PW at 45 wherein under the term "regulatory requirements" for "operation of dumps" the only referenced statute or regulation is KRS 149.395, which is geared toward requiring fire prevention measures if the waste site or open dump is near timberland. However, enactment of this forestry statute pre-dated the later outlawing of open dumps in their entirety. While the Hearing Officer rejects Mr. Hull's selective reading of this publication for the reasons stated both in this finding and in the Conclusions of Law, below, the Hearing Officer also finds this ambiguity is a legitimate factor in mitigating downward any otherwise appropriate civil penalties for any solid waste violations otherwise found. The PW is a Cabinet produced document which is intended to be relied upon by the regulated agricultural community and has been relied upon by Mr. Hull. However, notwithstanding some ambiguity in the PW publication, open dumps are clearly prohibited by law. See KRS 224.40-100(2). See also PW at 45 wherein its states that any solid waste disposed of on the farm must comply with the environmental performance standards of 401 KAR 30:031, which includes the fundamental requirement of providing cover. The regulation itself provides that any disposal without meeting the performance standards of the regulation will per se be considered to be an illegal open dump.[17] See Id. at Section 1.

6. Mr. Hull believes he was and is being unfairly treated by the Cabinet. However, the record contains no evidence that Mr. Hull has been singled out for any discriminatory or malicious reasons or for any purpose other than the Cabinet personnel performing their statutory obligations in good faith, as they believe appropriate. Mr. Hull does acknowledge that he was

[17]While some solid waste from a farm may be allowed to be disposed of on the farm without a permit pursuant to the provisions of 401 KAR 47:150 (the so-called deemed permit-by-rule provisions) all such disposal must meet basic environmental performance standards of 401 KAR 47:030, which are similar to those established by 401 KAR 30:031. The requirement of providing cover is required by both regulations.

not very nice to Ms. Sandhu, see III at 22, and the Cabinet acknowledges that he should not be penalized because of his beliefs and the exercising of his rights. See II at 380 (Ms. Bartley's testimony). See also Cabinet's brief as 42: "While the Cabinet certainly objects to all of Petitioner's claims of impropriety against its personnel, the Cabinet does not seek an unfair civil penalty amount in retribution against the Petitioner [Mr. Hull]."

7. On February 11, 2002, this matter was initiated by an anonymous call to the Cabinet's Department of Environmental Protection's Regional Office in Florence. Following said call, the Cabinet went to Mr. Hull's farm on the dates of March 22; May 30; and June 18, 2002.

8. For various reasons, which are not significantly relevant to the issues presented, the Cabinet did not conduct formal inspections on either March 22, or May 30, 2002, and has not cited any violations based on the observations made then. However, the observations, some viewable from Barrs Brach public road, led the Cabinet to believe that various violations of KRS Chapters 151 and 224 existed on Mr. Hull's farm.

9. Pursuant to the observations of Cabinet personnel made on March 22, and May 30, 2002, the Cabinet sought and obtained an Order of Entry and Inspection from Franklin Circuit Court under the authority of KRS 224.10-100(10). This Order was obtained from the Court by the use of two supporting affidavits from Cabinet personnel.

10. On June 18, 2002, the Cabinet's DWM and DOW conducted a joint formal inspection of Mr. Hull's farm accompanied by a state trooper for facilitation. As a result of and based solely on said inspection, the Cabinet's DWM issued its NOV to Mr. Hull on June 24, 2002; and DOW issued its NOV to Mr. Hull on June 27, 2002. See respectively Cabinet exhibits 3 and 10 for

copies of these NOVs. A summary of the charges and the parties respective positions thereto are set out in Section II of this report above.

11. The NOVs also listed remedial actions the Cabinet indicated were necessary to abate the cited violations and deadlines for completion of said remedial actions. Except for the cited waste tire violation whose remedial deadline was given as July 18, 2002, the remainder of the remedial deadlines provided for in DWM's NOV all listed the expired date of inspection, June 18, 2002, as the remedial deadline. The violations cited in DOW's NOV all listed July 24, 2002, as the required remedial deadline. The NOVs did not specifically mention the fuel tanker, the engine head in the stream, or any oil spills on the driveway, as part of the alleged violations or required remedial actions. The DOW NOV did specifically mention the sources of its violations and these were limited to the "fill" material adjacent to the stream and the alleged sewage discharge. As to the DWM NOV, it did not cite the source(s) of the alleged petroleum release and in its remedial measures simply advised Mr. Hull to "properly dispose of all waste oil and provide receipts." No remedial requirement to characterize the release was listed As to the disease vector violation, the remedial discussion was limited to the waste tires. Finally, the NOVs advised Mr. Hull of the maximum possible civil penalties but did not otherwise address said issue except for the solid waste violations of KRS 225.40-100/KRS 224.305 in the DWM NOV, which listed payment of a civil penalty of $250, as part of the required remedial actions.

12. The Cabinet has not conducted any follow-up inspections of Mr. Hull's farm following its June 18, 2002 inspection. This is largely due to the significant differences in points of view between the parties and the Cabinet's desire not to cause any additional friction between the parties. However, another factor in the Cabinet's determination not to conduct any follow-up

inspection is the Cabinet's belief that it was not particularly necessary under the circumstances of this case.

13. Mr. Hull, at least as to the facts relevant to the issues presented in this case, has conceded he has not performed any of the remedial actions listed in the two NOVs and has maintained the factual status quo as to those relevant facts.[18] Mr. Hull has not performed the listed remedial actions because he believes no violations exist and because he believes the Cabinet lacks the authority to require remedial actions to be taken prior to hearing. He has also maintained the site conditions as they were on June 18, 2002, in order to allow independent observers to view the factual conditions, which led to the NOVs. Though suggested as being appropriate by Mr. Hull, the undersigned did not conduct a site visit of the farm.[19]

14. The Cabinet's normal procedure after issuance of NOVs is to invite the cited person into the appropriate regional office for an informal conference to discuss the matters raised therein for possible resolution to avoid formal litigation. If that is unsuccessful and particularly if the person cited fails to take the remedial actions the Cabinet believes is necessary to abate the outstanding alleged violations as stated in the NOVs, the Cabinet then initiates formal enforcement actions under KRS 151.182(1) and KRS 224.10-420(1). The Cabinet would not follow this normal enforcement procedure if it determined an environmental emergency existed

[18] The one exception is to the tipped over leaking barrel. As to that barrel, he has drained its contents and re-barreled it into another barrel in order to save its contents, which he intends to keep for use. He admits it was leaking near the rim but established he was unaware of the leak prior to the Cabinet's inspection. Thus, when he brought this barrel into the hearing room it was largely empty.

[19] Mr. Hull moved for a site visit, but then withdrew said request after the Hearing Officer noted his concerns about a need for a videographer to record the site visit, as is his custom for record purposes; additional delay in the proceedings, which had already taken longer than the parties originally anticipated; and his need to avoid becoming a witness in the proceeding which would not be appropriate. Finally, the undersigned also noted prior to Mr. Hull withdrawing his motion, that he typically does a site visit to help his understanding of the evidence of record and did not believe it was necessary in this case.

or expedited action needed to be taken. In the present case, there was no environmental emergency and the Cabinet intended to follow its normal procedure.

15. However, in the present case Mr. Hull made it clear to the Cabinet that he contested all of the alleged violations cited in the respective NOVs and that he desired to exercise rights which would only be available to him at a formal administrative hearing.

16. Upon his receipt of the NOVs, Mr. Hull filed a letter with the DEP's Florence Regional Office contesting the alleged violations "requesting an administrative hearing" and requesting the presence of all witnesses for purposes of "discovery." See Cabinet exhibit 4. DWM's response (from its Frankfort office) to Mr. Hull was not introduced into the record but is established as being received by him on August 16, 2002. Mr. Hull replied to this response and again indicated in a letter to DWM's central office in Frankfort that he wanted a hearing to contest the violations with the ability to subpoena and cross-examine witnesses at said hearing. See Cabinet exhibit 17. This letter was forwarded to the Office of Administrative Hearings (Office) which docketed Mr. Hull's letter as a request/petition for hearing. This initiated action designated by File No. DOW/DWM-25904-037.

17. Upon his receipt of the DOW's NOV Mr. Hull filed an additional letter with the DEP's Florence Regional Office specifically contesting those alleged violations. In this letter, Mr. Hull specifically disputed the Cabinet's water sample and argued he has a functioning septic/sewage system to handle his farmhouse's waste. Finally, he also raised KAWQA as an affirmative defense to the violations and asserted the lack of DEP jurisdiction. See Cabinet exhibit 11 (without his attached copy of a portion of KAWQA). The attachment was forwarded to the Office, with Mr. Hull's other letter of July 11, 2002 (Cabinet exhibit 4) and docketed by the

Office as a separate petition for hearing. This petition was designated by File Nos. DWM/DOW-25904-039.

18. Mr. Hull believes he has been discriminated against and treated unfairly by the Cabinet's failure to provide him an opportunity for an informal conference to resolve these matters prior to this formal litigation. He has repeatedly raised this issue during the proceedings on this matter. While this belief may be sincere, there is no objective basis for it on this record. Given his above described letters with DEP, it was reasonable for the letters to be forwarded to the Office and treated as petitions for formal hearings contesting the NOVs.

19. In response to Mr. Hull's above described petitions, the Cabinet filed an answer and counterclaim against Mr. Hull seeking to adjudicate him guilty of the violations charged in the NOVs, impose on him civil penalties for the violations charged as allowed by the appropriate statutes per each day of violation, and to require him to perform all necessary remedial actions. See docket entry No. 3. This counter-claim followed the violations and remedial actions listed within the NOVs, with the exception of the penalties sought for the solid waste violations, which were now the maximum allowable.[20]

20. On November 12, 2002, a conference/show cause hearing was held on the above cases. As a result of said conference, the cases were consolidated, assigned to the undersigned for hearing and placed under a Scheduling Order. See Order entered on November 21, 2002, docket entry no. 5. The parties were allowed to and engaged in a period of discovery. This

[20] However, realizing that Mr. Hull is likely to feel discriminated against because of this, it should be noted that the Cabinet routinely settles cases as part of its "open dump" initiative for such a penalty, if the person cited cleans up the dump; but if he doesn't then the Cabinet's practice is to initiate a formal action seeking maximum penalties and clean-up. It should also be noted that the Cabinet's routine practice in all cases, with the exception of its surface mining program which has a unique penalty system, is to facially request the maximum amount of civil penalties in all of its administrative complaints.

discovery period was later extended and another Scheduling Order entered on March 4, 2003, docket entry 13. Subsequently, the hearing location was changed to accommodate Mr. Hull who had continually argued for a local hearing.

21. As to pre-trial issues, there were numerous contentious issues raised by the parties during the pre-trial period and those issues were ruled on prior to said hearing in various orders. Finally, it should be briefly noted that the parties' respective pre-trial issues are already preserved in the record and, thus, those issues will not be revisited in this report.

Facts relevant to the particular violations charged

B. Accumulation of waste tires on the farm

22. Mr. Hull is not and has not ever registered with the Cabinet as a waste tire accumulator or otherwise complied with the additional substantive requirements of the Commonwealth's waste tire regulatory program which are imposed on non-exempt accumulators of more than 100 waste tires. See KRS 224.50-850 through KRS 224.50-880.

23. Mr. Hull has accumulated significantly more than 100 waste tires on his farm which he is not and was not on June 18, 2002 using for their original intended purpose. These used tires were acquired by Mr. Hull from others no longer using them for their original intended purpose because the tires had at least some wear and damage. This includes counting both the pneumatic and non-pneumatic types of tires on the farm. The undersigned concludes that the Commonwealth's waste tire program does not distinguish between different types of tires and covers all waste tires, as otherwise defined in KRS 224.50-852(1). The undersigned also concludes that this definition of waste tires includes all used tires not currently in use for their original intended purpose because of wear or damage, even if still usable for said purpose.

24. Most of these waste tires on the farm are the solid non-pneumatic type which Mr. Hull doesn't need for their original purpose as there is no evidence he has any equipment like forklifts on his farm(s) which use this type of tire. There are substantially over a hundred of these non-pneumatic waste tires alone on his farm. These solid non-pneumatic type of tires are of less environmental concern than the other type because they do not entrap water and, thus, cannot serve as possible breeding grounds for mosquitoes.

25. The number of waste pneumatic tires not currently being used for their original purpose on Mr. Hull's farm also exceeds 100. While this fact is established less persuasively than the similar fact found for non-pneumatic tires, it is established by a preponderance of the evidence considered as a whole. However, there are substantially less numbers of such pneumatic tires on the farm than non-pneumatic and a significant number of these pneumatic tires are tires kept for later use as spares on various pieces of farm equipment. There are more significant environmental concerns with pneumatic type tires because they do entrap water and, thus, can serve as possible breeding grounds for mosquitoes.

26. Mr. Hull accumulates the waste tires on his farm for agricultural purposes. In addition, he has actually used all or virtually all of the waste tires for such purposes in the past and he has a good faith intent, which is for the most part objectively supported (see following Finding number 27, below for limited qualification), for their use in the future for ongoing agricultural operations. The basis for this finding is as follows:

a). Mr. Hull's testimony on these issues was detailed, credible, and consistent with his agricultural operations. As to the critical underlying facts for this summary finding, there is simply no significant doubt on this record. The undersigned rejects the Cabinet's argument that

Mr. Hull's testimony was inconsistent as to his use of the tires and believes the testimony simply establishes that Mr. Hull uses the tires for multiple purposes and while one type may generally be more preferable for a given job, both types of tires may actually work depending on the condition of the particular tire to be used for a given purpose.

b). Mr. Hull is currently engaged in active cattle operations at his farm, he has been so engaged for decades in the past, and intends to keep on cattle farming at this location in the future, though possibly at reduced levels because of his health and age. He has actively accumulated used/waste tires for use in his agricultural operations and has/is using the waste tires as follows: i) he initially uses all of the pneumatic tires as replacement tires for his numerous pieces of farm equipment given he does have numerous pieces of farm equipment which use pneumatic tires, including but not limited to seven tractors; ii) he uses multiple tires to hold up each of his round hay bales (up to 450 of these baled in a year) to keep them off the ground and from rotting; iii) he uses numerous tires (about one every four feet) to hold down plastic covers to keep his silage pile(s) airtight to keep them from spoilage, which silage comes from 30 acres of corn raised at one of his other locations where he also engages in as part of his farming operations involved in this action; iv) he uses the non-pneumatic tires as culverts by welding the steel together and explained that the Cabinet inspectors actually walked over two of these tire culverts during their June 18, 2002 inspection; and, finally, v) he takes the sidewalls off some of the waste pneumatic tires and then uses the cylinders for above ground gardening of strawberries and vegetables and the remaining sidewalls to hold down silage covers, as they would no longer collect water. He also testified about the possible use of waste tires in farm ponds to establish

fish habitat, which is a recognized use; but Mr. Hull did not testify or try to establish he has actually used tires for that purpose on this farm.[21]

c). While at least some of the above uses where not familiar to Mr. Gilbert, he did recognize the Cabinet has not promulgated any list of all possible agricultural uses. In addition, when he was asked specifically about using waste tires to keep hay bales off the ground he testified that "it makes sense." See II at 179. He was also familiar with the using of waste tires to hold down tobacco bedding and testified that generally one tire placed every 10 feet was sufficient for that purpose. From a common sense perspective, this use would seem similar to holding down the covering for silage piles, and Mr. Hull described in convincing detail the need for the placement of a greater number of tires to effectively cover a silage pile sufficiently to keep it from spoilage. See III at 27 and 43-44. As to his splitting of the sidewalls off waste pneumatic tires, he did introduce photographs of the tires so spilt, Hull exhibits 3 (separate sidewalls) and 4 (cylinders) which would seem to require a great deal of work to split which a person would not perform without having some purpose, which would otherwise be unexplained if these tire parts are/were not used for the stated purposes.

d). There is no evidence that Mr. Hull is using his farm as a general disposal site for tires or allowing others to dispose of any tires on his farm. While there are numerous tire piles, these are located at various places on the farm and do not contain the numbers within each pile which would be indicative of any general tire dump. In contrast, they do have the numbers and

[21] Mr. Hull testified that he has performed work as a bulldozer operator, primarily in the construction of agricultural ponds, and that he has made actual use of waste tires for this purpose. However, it was not clear whether he has done so in any pond on this farm or at any of his other current farming locations, which are part of his agricultural operations. It is clear that he is not claiming the single tire located in his pond, which was photographed by the Cabinet and introduced into the record, is being used to support fish habitat. He clearly does not know how the tire got in the pond.

locations more consistent with spread out usage, which might be logically expected on a farm. Given his accumulative and frugal nature, his belief in the possibility of beneficial re-use, and his explanations as to how he has accumulated the tires, it is believable that all of the tires have been brought there for his use as part of his agricultural operations.

e). While there was no obvious using of said tires on June 18, 2002, when the Cabinet conducted its inspection, this is not persuasive given the nature of the agricultural operations which vary by season to season and even year to year depending on weather and other factors. Thus, the Cabinet's inspection was only a snapshot of what was present that day and is not indicative of the tires' use overall in Mr. Hull's agricultural operations. It is also clear that the inspectors did not inspect even the whole of Mr. Hull's base farm. In addition, given the rotational nature of farming operations, it is probable that tires are accumulated at multiple locations for the same purpose even though they will not be used every year or season for that purpose. The record does indicate Mr. Hull does rotate/shift the location of his silage pile and/or feeding silage trench based on site conditions.

f). In making this finding, the Hearing Officer is cognizant and has considered that Mr. Hull did not introduce any photographs or other corroborative evidence of any of the tires actually being used for the stated purposes. Some purposes, like underlayment for the round hay bales, would probably not be visible by a photograph, but some uses could easily be shown in a photograph, such as holding down the silage pile cover or for above ground gardening. Basically from the time of the NOV through the time of the formal hearing was a full year and would have allowed an opportunity to photograph a typical cycle in Mr. Hull's agricultural operations, assuming it was a typical year. However, there are clear yearly variations in farming and the

record establishes Mr. Hull sold half his herd during this time and indicates it will take time for it to be re-established to the prior levels. He did not establish and was not asked to establish during his examination what his actual hay or silage production for the year preceding the hearing was and, thus, the record is silent as to whether he had any real opportunity to make such a photographic record of his typical tire usage. However, he did establish that as of the day of the Cabinet's inspection on June 18, 2002, he had not yet produced any hay for the year. As to past usage, he did not know he needed photographs or other such corroborative evidence prior to issuance of the NOV. Thus, notwithstanding this limitation in his proof and after consideration of all of the evidence of record in its entirety, the undersigned finds/concludes Mr. Hull has met his burden of proof to establish it is more likely than not that the tires were and are being accumulated for an agricultural purpose.

g). As to actual use requirements, it must also be noted that the Cabinet has not promulgated any regulations to define/limit the scope of the statutory exemption established for one who "accumulates waste tires for an agricultural purpose." Thus, there is no per se percentage of actual use of the tires per year required for the exemption, as the Cabinet may have in other programs such as in its hazardous waste regulatory program. While the undersigned agrees with the Cabinet positions that this agricultural purpose can be abandoned and the exemption lost, even if originally applicable; and agrees that "actions speak louder than words" requiring that the purpose be objectively established to qualify, this record establishes Mr. Hull continues to have an agricultural purpose for these tires which is not inconsistent with the current objective facts.[22]

[22] At some point of continued lack of any use in agricultural operations, a person would become either a non-exempt accumulator of waste tires or an illegal disposer of the waste tires.

27. The above finding is made notwithstanding that Mr. Hull has conceded that the scope of his farming operations is not as heavy as it has been at some points in the past due to his current medical condition and other unnamed factors. See III at 62. The record does not establish that the current level of reduced operations will continue indefinitely and while he has sold half his herd, he also implies that the size will be grown back in the coming years. The record also establishes that he has children who have helped and continue to help on the farming operations. Thus, the scope of future operations are not necessarily limited by his medical conditions/age.

28. Finally, as to the facts relevant to the alleged waste tire violations, the record establishes that a very few of the waste tires on Mr. Hull's farm have been abandoned from any agricultural use (e.g. the one tire in the pond and the one tire with a tree growing up through it) and/or are no longer viable for any appropriate agricultural uses and, thus, can arguably be considered as disposed of on the farm. However, the numbers of such tires do not even approach the numbers needed to impose registration requirements under KRS 224.50-586(4). Mr. Hull was not separately cited for any violation of KRS 224.50-586(1), which prevents the disposal of waste tires and which may even arguably apply to an accumulator otherwise exempt. Thus, this issue is not presented or argued but such tires must also be considered within the context of the alleged solid waste violations addressed next.

C. Disposal of solid waste on the farm

29. Mr. Hull does not now and he has never had any permit from the Cabinet to construct and/or to operate any solid waste site or facility on his farm or to conduct any disposal of solid

waste on his farm. In addition, he has not registered with the Cabinet any activity on his farm for the purpose of acquiring a permit by rule (PBR).

30. Mr. Hull has disposed of solid waste on his farm and has established/maintained open dumps on his farm. The basis for this finding is as follows:

a). Mr. Hull has at least four piles of debris on his farm which contain material from predominantly structure demolition type activities. These piles contain the following types of materials: miscellaneous wood, shingles (probably asphalt shingles), concrete blocks, metal debris, plexiglass, plastic, some paper, wood doors/windows and other such miscellaneous material of similar type. These are open unmanaged debris piles without any cover being provided. These piles are as follows:

i) One of these is an extremely small debris pile (or couple of nearby piles) next to an unoccupied trailer on the farm. See photographs in Cabinet's exhibit 1 at page 20. Mr. Hull did not claim any particular purpose or use for this debris pile and concedes it shows signs of "bad housekeeping."

ii-iii). Two larger piles are in pastures/valleys on the farm near or on areas which are used by Mr. Hull for silage trenches/feeding areas for his cows. See Cabinet's exhibit 1 at pages 21-24. These contain much larger pieces of demolition type debris including sheets of plywood, pieces of lumber, shingles, plexiglass, and metal. Mr. Hull concedes the plywood pieces have deteriorated beyond use for construction purposes but are used by him periodically as "windbreaks" to shield his operations (blowing silage) from the wind. He also claims use of this material as a "floor" for his feeding operations but the record is confusing on this issue as to whether any real use is occurring in the present

(some hay or silage may be laid on the larger pieces for the cows to feed off of) or whether he is only accumulating material which he believes he can "eventually" use as aggregate to make a floor for his silage trenches after further processing of the material. This material is also not currently managed or covered, with the exception that he purposefully does not stack the plywood pieces neatly and tosses them haphazardly in order to let them dry out and prevent them from rotting. He explains that he can continue to use them as windbreaks even though they are warped. As to this material in these two piles, the Hearing Officer finds that only the plywood is being beneficially re-used at the present time. However, while these two piles are larger than the small pile near the trailer, there is no evidence any of this material came from off-site and the piles are still relatively small to moderate in size.

iv). There is a fourth pile of this type material, predominantly wood window frames/doors, but also some limited pieces of metal debris which is deposited next to Mr. Hull's wood waste pile next to the stream. See Cabinet's exhibit 1 at 32/exhibit 8 at 7-8 (same photograph); and Cabinet's exhibit 8, at 8. Mr. Hull did not claim any use of this material and the record would support an inference that this pile is coming from off-site sources and coming in with the depositing of the adjacent land-clearing waste from off-site. This also is a small amount of material.

b). Mr. Hull is allowing others, who are in the business of land clearing, to deposit wood waste from off-site at a location adjacent to the stream (Barrs Branch Creek) on his farm. This material consists of chipped wood, sawdust, stumps, and tree limbs. This is a significant size dump of this type of material and has been going on for quite some time. The material is not

restrained. There is no sedimentation control. There is a significant amount of material on the stream bank and some limited amount has actually entered into the stream. The material closest to the stream consists of the larger pieces of un-chipped wood. The material further away from the stream is the chipped wood, which Mr. Hull is using as fill material to create a level porous area which will drain and be usable for a feeding/pen area for his cattle operation. That area is sufficiently stable to allow trucks to be parked on it. The extent of the fill is unknown. The Cabinet's photographs show only the end of the dump closest to the stream. See Cabinet's exhibit 1 at 32/exhibit 8 at 7-8 (same photograph) and Cabinet's exhibit's 1 at 33.

31. None of the piles of solid waste contain normal day-to-day household waste. On this record, Mr. Hull did not offer, nor was he asked, what he does with this type of household waste. However, the record does support an inference that he probably generates far less of this type waste than a normal two-person household and probably re-uses as much of this material as he is able. In addition, there is no evidence of any disposal of this type of waste on the farm.[23]

32. Finally, as to the facts relevant to the solid waste permitting violations, Mr. Hull has also collected a separate small pile of metal material on his farm consisting of radiator cores, metal tanks, and similar types of material. See Cabinet exhibit 1 at 27. This material has, at least partially, been collected by Mr. Hull from off-site sources, including his picking up of material which has been discarded by others along the roadside. This is material Mr. Hull periodically sells to a metal recycler for cash. This pile of mixed metal waste was apparently not separately cited by DWM as part of its solid waste permitting violations but the photograph was introduced for purposes of the alleged lead acid batteries violation discussed further below.

[23] The discovery record does contain an isolated receipt showing a payment to Rumpke, but this was not addressed on the evidentiary record.

D. Failure to take required remedial measures to control disease vectors (mosquitoes) at the waste sites

33. As to this alleged violation, the parties practiced this case exclusively as to the waste tires and did not address its applicability to the other solid waste at issue. All of the evidence of record on this issue concerned mosquitoes and the waste tires' abilities to entrap water and serve as breeding grounds for mosquitoes. See also the remedial contained in DWM's NOV, which only addressed the waste tires as to this violation.

34. The entrapment of water in waste tires and their ability to serve as breeding grounds for mosquitoes is a serious environmental and public health threat. Elimination of entrapped water is the best control technique. Mosquitoes are disease vectors and can lead to diseases such as West Nile virus, encephalitis, and meningitis. See testimony of Mr. Jim Newman at II beginning at 164.

35. The non-pneumatic waste tires do not entrap water. The pneumatic waste tires do entrap water.

36. The record does not establish whether local mosquitoes breed in saltwater. Mr. Newman was unable to answer this question. See I at 180.

37. The record does not establish any actual mosquito problem on Mr. Hull's farm. (This is not a prerequisite for the violation but would go to the amount of harm and penalty issues).

38. The only disease vector control technique ever used by Mr. Hull is the placement of small amounts of calcium chloride water into some of the waste pneumatic tires. Mr. Hull obtains this type of saltwater from his solid non-pneumatic/forklift tires which use this material as ballast. This is collected by Mr. Hull and stored in a barrel on his property for said use.

However, Mr. Hull concedes that he uses this technique only in his larger pneumatic tires which he works around himself to avoid having a mosquitoe problem while working. Thus, the record supports a finding that some of the waste pneumatic tires lack any disease vector control and have the ability to entrap water which could be breeding grounds for mosquitoes. See III at 223-225.

E. Failure to characterize/correct a petroleum release to the environment

39. During discovery, in response to a Cabinet discovery request, Mr. Hull described the contents of the barrel at issue to be "diesel fuel." See Cabinet exhibit 2. At the hearing, Mr. Hull testified and took the position that the content of the barrel is "bio-diesel" fuel. Mr. Hull argues his current position is allowable clarification. The Cabinet opposes this change and argues Mr. Hull should be precluded from making it as a matter of law because "it is obvious that Mr. Hull's intent was to place the Cabinet in the position of not being able to respond to this newly-formed defense claim, as the Cabinet reasonably relied upon his prior answer to have its common usage meaning - namely, petroleum based diesel fuel." See Mr. Hull's reply brief quoting from the Cabinet's brief, which is filed in the record as docket entry 63, at 26. As stated by Mr. Hull further in his reply brief: "Mr. Hull admits to being 'guilty as charged' to the above statement." Id. at 26. He also argues this is irrelevant because he feels the release is below threshold for reporting and, thus, from his belief, from any requirement to correct/characterize.

40. During discovery, in response to a discovery request by Mr. Hull, the Cabinet responded that the source of the petroleum release at issue was the "storage barrel." There was no mention of tanker truck or any stain in the driveway. See Cabinet answer to Mr. Hull's interrogatory no. 25. The Cabinet's answers are attached to its filing at docket entry # 16. Mr.

Hull argues the Cabinet should be precluded from factually relying on anything other than the one barrel in support of its alleged violation. See also Cabinet's prehearing memorandum at 9, docket entry No. 39, where only the "storage barrel" was discussed in relationship to the alleged KRS 224.01-405 violation.

41. As to the above issues raised by the parties as to the proper scope of the matters charged and whether the claim of biodiesel is allowable, the Hearing Officer finds as follows:

a). Mr. Hull's claim that the leaked material is only non-petroleum based diesel fuel is allowable clarification which did not prejudice the Cabinet in the presentation of its case. The Hearing Officer certainly went to the hearing with the knowledge that the claim of "bio-diesel" was going to be used by Mr. Hull and the docket file reflects some pretrial notice of this as well. During the pretrial procedures/filings, Mr. Hull certainly claimed there were no releases of any petroleum product and he produced a copy of the MSDS sheet from Griffin Industries, which is in this record only for avowal purposes. See docket entries no. 31 and 36. It must also be remembered that the barrel at issue was brought to the hearing, and while most of its contents had been removed to another barrel to preserve the contents use later, it was available for an odor test and or actual testing if the Cabinet desired. In addition, given the nature of how this case was heard, there were days between the hearing dates and the Cabinet did not close its case in chief until it was certainly well aware of this claim. Finally, the Cabinet did not attempt to call any rebuttal on this issue and it had time to do so.

b). The Cabinet's claim as to other possible sources of a petroleum release is not allowable clarification and would prejudice Mr. Hull in the presentation of his case because he was not noticed of those claims prior to the hearing. In fact, the Hearing Officer was not sure

during the hearing whether the Cabinet considered those sources as part of its claim or were mere references in passing. Only in the Cabinet's post-hearing brief is this made clear.

42. The amount leaked was well below the reporting thresholds for either diesel fuel (75 gallons in a 24-hour period) or for other petroleum based product (25 gallons in a 24 hour period). The barrel's maximum capacity was 55 gallons. The Cabinet did not charge Mr. Hull with any failure to report this release.

43. The only corrective action taken by Mr. Hull as to this release was to remove the contents of the leaking barrel and place the contents into a non-leaking barrel. This was done to preserve the contents for later use. The original barrel was leaking near the upper rim and the best estimate on record is approximately 1 gallon of total leakage. The Cabinet did not attempt to gauge the amount remaining in the tipped over barrel. Mr. Hull was not aware of the leak prior to the Cabinet's inspection. Mr. Hull believes the material is harmless and does not need any corrective action.

44. In the Cabinet's NOV, the only remedial sought on this alleged violation was for Mr. Hull to: "[p]roperly dispose of all waste oil and provide disposal receipts." See Cabinet exhibit No. 3. There was no request for removal of contaminated soil or for any further characterization/corrective action. The Cabinet did not provide any explanation at the hearing for why the sought remedial actions has changed. However, Mr. Burger did testify that whenever the Cabinet observes a petroleum release it routinely asks for characterization. See II at 97.

45. Bio-diesel is a petroleum free renewable resource product which is made from vegetable oils or animal fats and rendered into something which can be used as a petroleum substitute, including diesel fuel. However, this product is often blended with regular diesel fuel #

2 and the blends can range from 20% bio to 100 % bio or non-petroleum based. See testimony of Burger II at 47-49.

46. The record does not support a finding as to whether the leaked material contained any regular diesel fuel or other petroleum based product. The basis for this finding is as follows:

a). No one tested the material to actually establish its composition.

b). Mr. Hull's testimony as to what he believes the material is, how he acquired it, and how he uses it is credible, particularly in light of previous findings above. See e.g. Finding of Fact No. 4, above. In evaluating this testimony, it must also be remembered that Mr. Hull has a life-time of experience working around diesel engines and the old farm tractors which he uses on his farm. He established these old pre-1960's tractors can run on much coarser fuel than today's models, including the one piece of equipment on which he uses the material at issue. While Cabinet counsel may be skeptical, Mr. Hull is the only witness who testified who has knowledge and experience on these subject matters and these areas of testimony were described with the level of detail that indicates to the undersigned it actually happened.

c). However, Mr. Hull did not specifically address whether the material contained any blend of regular diesel and while the record supports an inference that he believes it is 100% bio-diesel he acquired this material at a farm auction and it is impossible to know its original integrity or composition. The barrel does not contain its original or any subsequent label and the record does not establish the condition of any labeling when acquired by Mr. Hull about ten years ago.

d). Mr. Burger, the only Cabinet witness to establish a personal familiarity with biodiesel and an ability to distinguish the different materials based on their respective odors, did not go the

barrel or the site of the release on the day of inspection or thereafter. In contrast, the Cabinet witnesses who did make such observations failed to establish their own ability to distinguish between the two items or their own familiarity with the characteristics of biodiesel. Mr. Hull testified that, in fact, it does smell like "waste oil" particularly as he has added cooking oil to it.

F. Lead acid batteries

47. Mr. Hull has a significant number of usable lead acid batteries on his farm. He uses these batteries as an integral part of his farming operations, including for the following purposes: starting farm equipment, the running of electric fences (the white fence lines shown in various photographs),[24] and running of water pump(s) when electricity is off. He has a battery charger to re-charge these batteries, as needed. See photographs in Cabinet exhibit No. 1, at 26. The photograph on the left shows a battery actually attached to the charger being actively re-charged on Mr. Hull's front porch. The remaining batteries shown on the left are waiting their turn at the charger. The photograph on the right shows a battery next to one of the white fence lines. While that battery was unattached to the fence line at the time of the photo, Mr. Hull testified that it had just previously been disconnected when the cows were recently moved.

48. Mr. Hull has about seven lead acid batteries on his farm which are currently not usable/re-chargeable. These batteries are stored on mixed metal waste which is being accumulated for sale as scrap metal. See Cabinet exhibit 1, at 27 and Finding No. 32, above regarding this pile of mixed metal waste. Mr. Hull periodically turns his non-usable lead acid batteries into a dealer in return for some others which are useable. That is his intention for these

[24] Mr. Hull testified that: "...[w]e have got electric fences all over the place. There are probably at least a dozen electric fences. And that's part of the reasons we have so many batteries--because all of the electric fences are battery operated." See III at 20.

non-useable batteries shown in the Cabinet's photograph. It is important to note that these batteries are stored upright in an organized fashion on the mixed metal waste and are not simply tossed into the pile of mixed metal waste, which tends to corroborate Mr. Hull's testimony as to his intentions for said batteries.

49. The Cabinet has a legitimate concern regarding a possible or at least the potential for releases of lead from these batteries, particularly in light of its belief that the one photograph appears to show some unexplained drainage underneath one of the batteries. See Id. However, the Cabinet has not charged Mr. Hull with any alleged release of lead or other hazardous substance, pollutant or contaminant into the environment under KRS 224.01-400. (Except for the alleged petroleum release cited under KRS 224.01-405). Mr. Hull has purposely maintained the status quo as to the conditions on the farm resulting in the Cabinet's allegations, including his continuing to store these unusable batteries as shown in the photograph. From his perspective, this is simply to keep the evidence intact. Undoubtedly, a better BMP would be to have a much quicker turn around time for delivery to the dealer and to containerize these unusable batteries during their storage but that is not an issue in the present case. However, the record does not provide any evidence as to the length of time these unusable batteries were being stored prior to the June 18, 2002 inspection or Mr. Hull's customary turn around time for similar batteries before turning them into a dealer.

50. Mr. Hull has not disposed of any lead acid batteries. The basis for this finding is as follows:

a). See Findings 47-49 above.

b). In addition, Mr. Hull's testimony as to the lead acid batteries on his farm was credible and un-rebutted by the Cabinet. See III at 20, 103-110 and 198-201.

G. *Placing of fill material (wood waste) in or along a stream*

51. This fill material is the same material which is one of the piles of waste which was cited as part of DWM's disposal of solid waste without a permit case. See Finding of Fact 30 b), above, which is hereby incorporated into this section of the report. The Hearing Officer has concluded that placement of all of this fill material constituted illegal open dumping. See Conclusion of Law 37, below. Additional facts will now be found, as necessary, for considering the separately cited alleged violations by DOW for this same activity and the one performance standard violation cited by DWM which relates to water resources issues. This is the alleged violation of 401 KAR 47:030 Section 2, which prohibits disposal activity in floodplains, etc.

52. Mr. Hull has not obtained any KRS 151.250/401 KAR 4:060 permit from the Cabinet regarding this fill activity on his farm.

53. Mr. Hull has not sought or obtained any "letter of exemption" from the Cabinet regarding this fill activity on his farm. Mr. Hull believes he is entitled to an agricultural exemption under KRS 151.250(3) and that he need not apply for an exemption approval which is given without limitation by the statute.

54. The Cabinet believes an exemption under KRS 151.250(3) must be sought by the farmer and approved by the Cabinet prior to the farmer engaging in any construction activity across, along, or adjacent to a stream. See testimony of Mr. Art Clay, II at 119-120. However, no authority was provided for such a procedure (there is no such procedure established by the regulations or even mentioned) except that KRS 151.250(3) does provide an exception to the

exemption if the stream obstruction is "determined by the cabinet to be a detriment or hindrance to the beneficial use of water resources in the area, ..." The Cabinet's reasoning is that it cannot perform its oversight responsibilities provided in this statute as to exemptions unless it is notified of the proposed construction and approves the exemption prior to it occurring. Mr. Clay also testified that it is the applicant's burden to establish any claim for exemption and the exemption would have to be obtained prior to the construction. See Id. at 134.

55. During the hearing, the undersigned Hearing Officer put the parties on notice as to a possible interpretation issue he had as to Mr. Hull's claimed exemption under KRS 151.250(3). The issue is whether the description of the exemption as being limited to systems such as drainage district, ditches, or similar systems used for agricultural purposes limits the types of construction which qualify for the exemption. Thus, the Hearing Officer raised an issue as to whether the exemption applies to fills to be used for agricultural purposes or only to systems such as drainage district, ditches, or similar systems, which presumably would be for the purpose of obtaining water. This possible interpretation may also be suggested by the language quoted in Finding No. 54, above regarding an exception to the exemption based on the Cabinet determining the system/ditch/drainage district is a detriment or hindrance to the beneficial use of water resources in the area. However, notwithstanding this issue being raised by the undersigned, the parties did not provide any evidence as to the Cabinet's history of interpretation or current interpretation of KRS 151.250(3).

56. The record does not establish the extent of either the "floodway" or "floodplain" of Barrs Branch Creek at the location of the fill.

57. The record does not establish the watershed of Barrs Branch Creek but does support an inference that said watershed is greater than one square mile. This is based on Mr. Clay's testimony that he reviewed the topographic map of this area after receiving a call and coordinates of the fill from Inspector Stacy Nichols and that based on said call and review of the map he concluded that a violation occurred.

58. The extent of the fill is unknown. However, it does extend down the Barrs Branch Creek stream bank and a small amount of it does actually extend into the stream itself. Thus, a small portion of the fill must be within the floodway of the stream. See Cabinet exhibit 8, at 7; testimony of Inspector Jones, II at 203, 219, and 230; and testimony of William Burger, II at 83-84, and 89.

59. The material is not restrained or fastened in any manner and there is a likelihood of eventual wash-out of the fill/wood waste into the stream which could cause obstruction particularly during significant precipitation or flood events. This is an environmental risk to both backwater effect upstream of the fill and the possibility of the washed out waste causing obstructions further downstream (i.e. flowing debris clogging road culverts, etc., downstream). However, there is no evidence of record to suggest this fill has yet caused any significant environmental problems. There is a slight aesthetic degradation of the stream at the site where the fill enters it.

60. While the evidence of record supports a finding that portions of the fill area will eventually be used for an agricultural purpose to relocate Mr. Hull's cattle feeding pens/area on, Mr. Hull did not meet his burden to establish the entire fill area will be used or be usable for any

agricultural purpose, particularly that portion of the fill currently in the floodway and extending for some unknown amount of area from the stream. The basis for this finding is as follows:

a). The portion of the fill made up of large pieces of tree debris and stumps is simply not a credible location for any such agricultural operation.

b). The record also establishes that KAQWA and the required BMPs thereunder would not allow a feeding operation to be located within a specified but unknown distance of the stream. However, the exact required set off in order to comply with applicable BMPs is unknown on this record. The record does support a finding that modifications were going to have to be made to keep the cattle feeding operations away from the stream. See Hull, III at 134 and 137.

H. Having an unpermitted discharge (straight pipe or ditch) of human sewage from the farmhouse into the creek

61. Mr. Hull does not have any KPDES permit from the Cabinet.

62. Mr. Hull has an on-site septic system for the treatment of human sewage from his farmhouse. This septic system pre-dated regulation of such systems by the local health department. The septic system has functioned without any known problems or maintenance in the past.

63. Barrs Branch Creek is downslope and in close proximity to Mr. Hull's farmhouse.

64. On June 18, 2002, there was a pool/flow of water which was high in fecal coliform contamination. This water was located in a ditch near and behind the residence. The water soaked into the driveway or was simply a wet area on the driveway when it disappeared. See photograph at Cabinet exhibit 8, at 5. The water did not reach Barrs Branch Creek.

65. Assuming Mr. Hull's on-site septic system is malfunctioning, it would result in a discharge of human sewage into Barrs Branch Creek, at least during precipitation events and the system would need to be repaired to prevent an illegal discharge of pollutants without a permit.

66. The Cabinet did not meet its burden to establish the source of the fecal contamination in the Cabinet's sample was from Mr. Hull's septic/plumbing system. The basis for this finding is as follows:

a). Given the entirety of the record considered as a whole, contamination from other sources is as likely as contamination from Mr. Hull's septic system or plumbing. This includes possible contamination from the cow pasture upslope and possible contamination from dogs with access to the area of the sample.

b). Mr. Hull quickly and adamantly responded to the Cabinet's NOV advising the Cabinet that he had a functioning septic system located in a completely different area from the sample point and, thus, his home's sewage could not possibly be the source of the contamination. He has steadfastly maintained this position throughout this proceeding. The Hearing Officer finds his belief on this issue is sincere but the degree of his actual knowledge on this issue may be questionable. He did establish he has actual knowledge of the location of his septic tank (the top fell in and was replaced since he lived there) but he did not necessarily establish any actual knowledge of the exact location of the lateral fields serving the septic system.

c). There was no follow-up by the Cabinet and no dye test was performed or attempted.

d). The record supports an inference that the Cabinet assumed the septic system was located in Mr. Hull's backyard and could be the source of the contamination because of current health department standards, which would have precluded location of an on site system in the

front of his house due to that area's slope. Current standards would result in favor of locating such a system in the more level area of the backyard. However, the record supports a finding that construction of Mr. Hull's septic system preceded any standards/regulations for such systems and the Cabinet's assumption is unwarranted. The Cabinet also believed/assumed the ditch where the water sampled was located was man-made but the record supports a finding that it is more likely to be simply an erosion gully from drainage coming off the hill above.

e). The Cabinet did not trace the origin of the flow/pool of water, which it sampled. Thus, there is absolutely no evidence of any direct straight pipe type of discharge coming from the home.

f). While the Cabinet's witness Ms. Bartley testified that the contamination was consistent with human sewage, she could not rule out contamination from other sources even after considering the precipitation data introduced as Cabinet's exhibit no. 15. There were too many unknowns such as the area's slope and groundwater regimen. See II at 417-418.

g). The backyard area does not exhibit any "lush growth" which is often associated with such discharges.

h). While the results of the water sample taken on Mr. Hull's behalf by Mr. Leopold was a composite sample taken with prior notice to Mr. Hull and is therefore entitled to less weight than the results from the Cabinet's corresponding sample, those results are not consistent with sewage contamination.

i). Thus, in summary, the evidence of record is not sufficiently persuasive for the undersigned to make a finding as to whether or not an unpermitted discharge of human sewage occurred.

67. Further investigation of this issue, including the Cabinet performing a dye test on Mr. Hull's system is warranted on this record. This is particularly true given that Mr. Hull's cistern is located near the sample site and as children are allowed to play in the area, as well.

Additional facts related to Maggard Factors which are non-violation specific

68. Mr. Hull has not been previously cited for any environmental law violations.

69. Mr. Hull's total farm income last year was seven thousand dollars ($7,000), which he obtained from selling half of his herd. There will be no further farm income for the coming years. He also has some limited but unknown income from working part time in a lawn mower shop.

70. Mr. Hull has some severe but unspecified medical disabilities which restrict his physical activities though he continues to work his farm. He is unable to sit comfortably for any length of time and prefers standing or lying down.

71. While the record supports his motive is financial gain, the record supports a finding that Mr. Hull has picked up metal waste from the roadside for purpose of collecting it and then selling it to a scrap metal dealer for recycling.

V. CONCLUSIONS OF LAW

After carefully considering the above Findings of Fact and the arguments of the parties, the Hearing Officer hereby makes the following Conclusions of Law:

GENERAL CONCLUSIONS

A. General conclusions of law; burden of proof

1. Ordinarily, a person requesting a hearing to contest a Cabinet determination has the burden of proof to go forward and the ultimate burden of persuasion to establish the

determination is contrary to law or fact. See KRS 224.10-420 (2) and 401 KAR 100:010 Section 13. However, it must be noted that the statutes and regulations do not specifically or separately address requests for hearings by persons cited following Cabinet determinations to issue administrative NOVs. These type requests are not routine though do occur occasionally. Generally, in cases involving enforcement issues, the Cabinet files an administrative complaint under KRS 224.10-420(1) against the person charged in order to establish the fact of violations and its claims for penalties and remedial orders. Given these facts and as the Cabinet's counter-claims in this matter have made this case, in essence, a typical Cabinet enforcement case which would be brought under KRS 224.10-420(1) and 401 KAR 100:010 Section 12, the Hearing Officer has concluded that it is appropriate to follow the burden of proof regulation established under this latter regulation at 401 KAR 100:010 Section 12(4). Thus, the Cabinet has the burden of going forward and the ultimate burden of persuasion to establish the facts necessary to establish the violations occurred and those facts it relies upon in support of the imposition of civil penalties and remedial actions. Mr. Hull has the burden to establish any affirmative defense or claim for exemption or any facts he relies upon in mitigation of any civil penalty otherwise warranted. Finally, the Hearing Officer concludes that this allotment of burden of proof is consistent with fundamental fairness and consistent with the parties' respective abilities to establish the particular facts at issue. See also KRS 151.182(1) and (2) for the violations charged under that chapter, with language similar to KRS 224.10-420(1) and (2). The cited regulation applies to violations under both Chapters of the statutes.

2. For the record, the parties were previously advised of the above ruling on burden of proof prior to the hearing and, in fact were advised of this ruling early during the discovery

period. At the same time and in the same Order, the parties were also advised of the factors (the *Maggard* factors which are discussed further below) which the Hearing Officer considers in the imposition of a just civil penalty, if any violations are found to be established after hearing. See Order entered on November 21, 2002, docket entry no. 5.

3. Findings of Fact must be based on a preponderance of the evidence of record considered as a whole. 401 KAR 100:010 Section 3(5)(a). The Secretary's Final Order must be based on substantial evidence of record considered as a whole. 401 KAR 100:010 Section 3(6)(c).

B. General conclusions of law; factors relating to imposition of civil penalties

4. As to an appropriate civil penalty for any violations established on this record, the Hearing Officer is, of course, bound by the statutory range authorized by the particular violation found. These statutory authorizations, which in this case range from maximums of one thousand dollars ($1,000) per day per violation up to twenty-five thousand dollars ($25,000) per day per violation, without setting forth any per se minimums, will be set out further below when addressing the particular type of violation charged. It must also be noted that for the violations charged the statutes do not otherwise establish the factors to be considered in assessing an appropriate civil penalty for the violations. See KRS 151.990 and KRS 224.990.

5. Otherwise, as to civil penalties, the regulations provide that the Hearing Officer shall base his recommendations exclusively on the record of the proceeding, shall state with particularity the reasons for said recommendation, and said reasons must be supported in the record. Finally, the Hearing Officer is authorized to compute the amount of the civil penalty recommendation irrespective of any computation offered by any party. See 401 KAR 100:010

Section 3(5)(b). In the present case, the Cabinet did not offer any specific civil penalty computation for any of the alleged violations separately or any specific computation for the violations in total. The Cabinet simply argued a non-specific "substantial civil penalty for the most serious violations, and a more moderate civil penalty for those less-serious violations" should be assessed. See Cabinet's brief at 46, docket entry no. 58. Mr. Hull argued no civil penalties are warranted given his argument there are no violations established on this record. In his arguments and evidence, Mr. Hull did not separately focus on any evidence to justify the mitigation downward of any civil penalties otherwise warranted.

6. Within the applicable statutory authorization for civil penalties, the Secretary in a Final Order entered on June 2, 1994,[25] has given guidance as to certain factors which should be considered in determining an appropriate civil penalty for violations of KRS Chapter 224. These factors have also been used for assessing appropriate civil penalties for violations of KRS Chapter 151. As noted above, a copy of these factors was provided to the parties in the Hearing Officer's Order entered on November 21, 2002. These factors are as follows:

a). The seriousness of the violation, taking into account such factors as i) the susceptibility of the site to environmental harm of the type concerned in the case; ii) the physical, geographic and chronological extent of the violation; iii) the inherent danger to the environment or human health and safety posed by a violation of the type concerned in the case; iv) the substantive nature of the violation, e.g., whether it is a reporting violation or a substantive standard of the law or regulations; and v) whether the violation is correctable and, if so, the type

[25] *NREPC vs. Wendell Maggard,* File No. DWM-19198-038.

and extent of remedial efforts required to correct the violation, taking into account any secondary harm to the environment which may be caused thereby.

b). The economic benefit (if any) resulting from the violation.

c). The economic impact of the penalty on the violator, including the cost of remediation.

d). The history of other violations on the site by this violator.

e). The culpability of the violator.

f). The good faith actions of the violator to remedy the violation, comply with the law or obey an order of the Cabinet.

g). Such other matters as imposition of a just penalty would require.

h). The number of days the Cabinet shows the violator to have violated the law.

7. In addition, as to the issue of determining appropriate civil penalties for any violations otherwise established, in general, a good conceptual framework for reasoned decision making is that the largest civil penalty should be reserved: "for a violation having the greatest potential and actual environmental impact committed by an entity that did no work toward abatement, profited by the violation, and is both entirely culpable and financially well endowed. The smallest penalty should be reserved for an event and entity having the opposite attributes." *See NREPC v. Jesse Turner, d/b/a J & J Minit-Mart*, File No. DWM-31295-043 (Final Order of Secretary entered on November 26, 2001).

8. Finally, Petitioner has raised some general civil penalty issues which must be considered if any violations are established that otherwise warrant imposition of civil penalties. These issues concern his belief that the Cabinet is "piling on" as to the violations cited by its citation of the very same activity/elements under multiple violation/programs and by threatening

the maximum civil penalties per day of violation, which admittedly could lead to astronomically absurd civil penalties, particularly when threatened on a small farmer such as himself. Mr. Hull argues this is unfair and operates as a strategic tactic used by the Cabinet to force cited persons to waive their rights to contest said allegations and to force them to settle. While these issues will be considered more fully below when assessing appropriate civil penalties for the violations found on this record, the Hearing Officer concludes that fairness requires both merger of violations for penalty purposes where appropriate and not penalizing a person more severely because he exercises his rights to contest the Cabinet allegations.[26]

C. KAWQA as an affirmative defense

9. As noted above, Mr. Hull has raised KAWQA as an affirmative defense to all of the violations charged. This statute is codified at KRS 224.71-100 to KRS 224.71-140. Generally, this act requires all covered "agricultural operations" to develop agricultural water quality plans and for those plans to implement best management practices (BMPs) in said operations. See KRS 224.71-120. In addition, KAWQA establishes the "Kentucky Agricultural Water Quality Authority"(Authority). The Authority is attached to the Cabinet and among other responsibilities develops statewide agricultural water quality plans. All such plans must be approved by the Cabinet's DOW. Finally, a person engaging in agricultural operations who timely and properly implements the applicable requirements of the statewide agricultural water quality plan shall be deemed in compliance with KAWQA even where water pollution is documented by the Cabinet. It would then be the responsibility of the Authority to make modifications of the plan to prevent the documented pollution. See KRS 224.71-120(3).

[26] In fact, the record supports the Cabinet agrees with these principles in general as Cabinet counsel in his briefs indicated some merger of violations would be appropriate for civil penalty purposes.

10. The term "agricultural operations" is defined at KRS 224.71-100(1) as follows:

> (1) "Agriculture operation" means any farm operation on a tract of land, including all income-producing improvements and farm dwellings, together with other farm buildings and structures incident to the operation and maintenance of the farm, situated on ten (10) contiguous acres or more of land used for the production of livestock, livestock products, poultry, poultry products, milk, milk products, or silviculture products, or for the growing of crops such as, but not limited to, tobacco, corn, soybeans, small grains, fruit and vegetables; or devoted to and meeting the requirements and qualifications for payments to agriculture programs under an agreement with the state or federal government;

11. Generally for a covered agricultural operation to be subject to civil penalties for water pollution or violations of KRS 224.71-100 to KRS 224.71-140, the notice and enforcement prerequisites of KRS 224.71-130 must be followed. This includes properly labeling the farmer as a "bad actor" for failure to comply following the required notice under KAWQA. This enforcement scheme is established by KRS 224.71-130, which provides in its entirety as follows:

> Noncompliance with agriculture water quality plan.
>
> (1) For purposes of KRS 224.71-100 to 224.71-140, if the cabinet's Division of Water documents that a person engaged in agriculture operations is conducting or allowing the conduct of any agriculture operation in a manner which results in water pollution or if the person fails to implement the provisions of the applicable agriculture water quality plan, the Division of Water shall notify the person in writing, with a copy of the notice to the appropriate conservation district, of the following:
>
> (a) The facts alleged to constitute the water pollution or failure to comply with applicable laws or requirements of the agriculture water quality plan alleged to constitute the noncompliance;
>
> (b) Availability of any technical and financial assistance from state or federal sources through the conservation districts; and
>
> (c) Set forth a reasonable period for compliance or, the person engaged in agriculture operations may submit a compliance plan which may include a compliance schedule with corrective measures designed to correct the failure to conform with the applicable provisions of the agriculture water quality plan subject to approval by the Division of Water. A compliance schedule may incorporate corrective measures and time schedules

> recommended by the appropriate conservation district, if requested by persons engaged in agriculture operations.
> (2) If any person engaged in agriculture operations fails or refuses to comply or respond to the written notice, unless excused or extended by the Division of Water, the person shall be deemed a "bad actor" and shall be subject to enforcement action for violations of KRS 224.71-100 to 224.71-140 as well as loss of eligibility for further financial assistance.
> (3) In any violation issued under this section, the cabinet shall consider the compliance of a person with the state and any regional agriculture water quality plan as a mitigating factor in determining whether to impose civil penalties.

12. Finally, the provisions of KRS 224.71-140 must also be considered in the proper construction of KAWQA. KRS 224.71-140, in its entirety, provides as follows:

> Construction of KRS 224.71-100 to 224.71-140
> Nothing in KRS 224.71-100 to 224.71-140 shall be construed as affecting the obligation of any person concerning any permit, certification, or authorization required under state or federal law. Nothing in KRS 224.71-100 to 224.71-140 shall be construed to require the cabinet to give prior written notice in the case of any violation of a permit, certification, or authorization required under state or federal law or in the case of any violation requiring emergency action for violations of KRS 224.10-410, 224.01-400, and 151.297 or enforcement of any administrative or judicial order to protect human health or the environment.

13. As to this issue the Cabinet argues, in addition to other arguments, that Mr. Hull should be precluded from raising KAWQA as an affirmative defense because Hr. Hull failed to provide a copy of his water quality plan even though it was requested by the Cabinet during discovery. In response, Mr. Hull argues he could not find his copy of the plan, argues it is on file with the appropriate agency, the Campbell County Conservation District, and that he provided collateral documents indicating that agency has acknowledged it is on file. See Hull exhibits 7 and 8. Notwithstanding the Cabinet's objection, the undersigned has found that Mr. Hull has

adopted a plan and/or self-certified he would comply with the requirements of the applicable statewide plan. See Finding No. 4, above.

14. However, notwithstanding Mr. Hull has adopted a plan and/or self-certified he would comply with the requirements of the applicable statewide plan, the undersigned concludes that KAWQA is not an applicable defense to any of the violations charged. The basis for this conclusion is as follows:

a). Mr. Hull is not charged with water pollution from his agricultural operations under KAWQA.

b). Thus, the issue is whether the Cabinet wrongfully failed to charge the covered activities under KAWQA. It did not. All of the activities charged are activities which, assuming the Cabinet allegations are valid, would require a permit, certification, or other authorization from the Cabinet. KRS 224.71-140 makes KAWQA inapplicable to such charges. The only exception is the alleged violation of KRS 224.01-405 for failure to correct/characterize the allege release of a petroleum product.

c). The undersigned concludes that KAWQA's purpose was to bring into environmental regulation agricultural operations which can cause water pollution and which operations were not otherwise covered by other regulatory programs of the Cabinet. In return for said expansion of regulation, the General Assembly also provided a defense to any violations of the expanded regulation based on the agricultural operation being in compliance with the applicable BMPs. Thus, the Hearing Officer concludes that it was not the General Assembly's intent to exempt agricultural operations from the requirements of KRS 224.01-405, which was contemporaneously established and which requirements are not unique to agricultural operations.

D. General issues raised as to fairness; due process of the proceedings

15. Mr. Hull has raised and preserved numerous issues concerning the validity of the proceedings, including but not limited to his principal arguments as follows: failure of the proceedings to provide for a jury trial in spite of the potentially large civil penalties which could be imposed;[27] failure of the proceedings to allow for hearing on his monetary claim against the Cabinet for alleged malfeasance,[28] etc.; failure of the proceedings to be heard by an impartial non-employee Hearing Officer;[29] and failure of the Cabinet to obtain a search warrant supported by probable cause prior to the Cabinet inspection, which resulted in initiation of these proceedings.[30] These issues will not be further addressed but are noted as preserved.

E. General issues; remedial action

16. Mr. Hull has repeatedly questioned the Cabinet's authority to require remedial actions prior to a hearing, as those remedial actions were set out in the NOVs. However, this issue is moot given the hearing has now been held, and he acknowledges the Cabinet's authority to order appropriate remedial actions after hearing. It must be noted that Mr. Hull has not been separately

[27] This argument has been rejected by the courts because the right to a jury trial has been determined not to attach to actions of an administrative agency even where imposition of civil penalties is the issue. See *Morgan v. NREPC,* 6 SW3d 833, 843 (Ky. App 1999).

[28] Administrative agencies are limited by their statutory authority and the General Assembly has not authorized this agency to hear such monetary claims against the Commonwealth.

[29] The statute authorizes Hearing Officers to be employees of the Cabinet. See KRS 224.10-410(1). Organizationally, Cabinet Hearing Officers are attached to the Cabinet's Office of the Secretary and are completely independent of the Cabinet's separate regulatory agencies and its prosecutorial arm (Office of Legal Services). Finally, Hearing Officers are given merit system protection which protects them from the types of influences Mr. Hull is concerned about.

[30] Of course, the Cabinet did obtain an Order of Entry and Inspection from Franklin Circuit Court pursuant to the authority of KRS 224.10-100(10). Mr. Hull has conceded this was much like a search warrant, but from his perspective, without a probable cause requirement. However, he also conceded that much of what is at issue was visible from the public road, the Cabinet was at his farm twice previously after the Cabinet received the anonymous call, and the parties have noted the Order was given based on two affidavits, which presumably supported entry of the Order. The parties did not formally enter either the Order or the Cabinet's affidavits into the record and Mr. Hull did not make any formal motion to exclude evidence on this basis. While there was some reading of at least portions of the Order during testimony, the focus was limited to the issue of whether the Order allowed a follow-up visit and authority to take samples.

charged with any failure to comply with the remedial requirements specified within the Cabinet's NOVs.

17. However, it is important to note that many violations of KRS Chapters 151 and 224 are ongoing in nature until the violations are actually eliminated. This depends on the particular elements of the violation charged. For those type violations this means, in essence, performing the required remediation to eliminate the violation. Thus, the Cabinet's practice in providing a charged person with notice of the remedial expectations of the Cabinet serve the legitimate purpose of notifying the charged person with information needed to abate the violation and eliminate the potential for further environmental harm and the risk of further ongoing days of civil penalty. However, even for those violations which are not ongoing in nature, the Cabinet's practice of providing notice of remedial actions within the NOV serve the purpose of reducing environmental harm, which may be ongoing even if the violations themselves are not, and allow the charged person with the opportunity to mitigate downward any civil penalty, which may otherwise be imposed. The Secretary in the *Maggard* case, above, has ruled that performance of remedial action is an appropriate factor for consideration in imposition of an appropriate civil penalty for violations of KRS Chapters 224 and 151. Thus, the notification of remedial actions within NOVs are entirely appropriate.

18. The Cabinet has authority to order appropriate remedial actions in its Final Orders. See KRS 224.10-100(18). See also KRS 224.40-100(3) for violations of KRS 224.40-100 and KRS 224.305; and KRS 224.01-405 (duty to correct/characterize any release of petroleum but also allowing the options of KRS 224.01-400(18)-(21)).

SPECIFIC CONCLUSIONS AS TO THE PARTICULAR VIOLATIONS CHARGED

F. Accumulation of waste tires on the farm

19. As to Mr. Hull's accumulation of tires on his farm, he is charged with violating KRS 224.50-586(4). The maximum civil penalty for any violations of this statute is: "... one thousand dollars ($1,000) for said violation and an additional civil penalty not to exceed one thousand dollars ($1,000) for each day during which the violation continues... ." See KRS 224.99-010(8). The statute cited as violated, KRS 224.586(4), provides as follows:

> (4) No person shall accumulate more than one hundred (100) waste tires in Kentucky at a time without meeting the requirements of the waste tire program, unless exempted by KRS 224.50-854 or accumulated in accordance with subsection (5) or (6) of this section.

20. Waste tires are defined by KRS 224.50-852 which provides as follows:

> Waste tire program – Administrative regulations
> (1) A waste tire program is created to manage waste tires which for the purposes of KRS 224.50-850 to 224.50-880 shall include:
> (a) Tires not used for their original, intended purpose due to wear or damage;
> (b) Used tires stored for resale; and
> (c) Processed waste tire material.
> (2) The cabinet may promulgate administrative regulations to implement the waste tire program.

21. The exemptions referenced in KRS 224.50-586(4) are established by KRS 224.50-854. Mr. Hull relies on the first exemption to the program which exempts: "[a] person who accumulates waste tires for an agricultural purpose." See KRS 224.50-584(1).

22. The parties' arguments are summarized above in Section II A of this report but no case authority is cited on the issues presented. Also as noted above, the Cabinet has not exercised its authority to promulgate any regulations implementing the waste tire program with

the exception of two regulations limited to implementing the grant and loan programs developed therein. The regulations do not address the factual or legal issues presented in this case. Thus, the undersigned must rely on the express language of the statutes and consideration of the purpose behind the Commonwealth's waste tire program in interpreting its provisions.

23. The purpose behind the Commonwealth's waste tire program was set out by the Kentucky General Assembly in its legislative findings which are codified at KRS 224.50-850. These findings are as follows:

> Legislative findings.
>
> The General Assembly finds that waste tires are a threat to human health, safety, and the environment when they are not properly managed. The General Assembly further finds that waste tires can be used in civil engineering applications, as tire-derived fuel, and may be recycled, but that markets for these uses have not been adequately developed. Therefore, a waste tire program should be established to manage waste tires in a way that protects human health, safety, and the environment, and which encourages the development of markets for waste tires.

24. As to the definition of "waste tire" issues, the undersigned concludes the statutory program does not distinguish between types of tires, includes both pneumatic and non-pneumatic types of tires, and includes used tires which are not currently in use for their original intended purpose because of prior wear and damage. Thus, used tires are covered within the definition of waste tires even though they may still be usable for their intended purpose. These conclusions are consistent with the Cabinet's interpretations on these issues, as established by its witnesses, Mr. Gilbert and Mr. Prater. The Cabinet's proffered interpretations are entitled to some deference even at this level of review, as the Cabinet is the responsible agency for the

program. Particularly, as Mr. Gilbert, who is familiar with the waste tire program since its inception, establishes the Cabinet's consistency of interpretation on these issues. As to Mr. Hull's proffered distinction between pneumatic and non-pneumatic tires that distinction is simply not possible by any reading of the plain language of the statutes. As to Mr. Hull's interpretation that useable used tires are not included, that interpretation is not completely impossible, particularly given that if such used tires are held for resale they are specifically included in the definition of "waste tires" and there is no specific separate inclusion of used tires held only for reuse.[31] However, those used tires not currently in use are easily within the broader definition of waste tires in KRS 224.50-582(1)(a) and without subsection (b) it could have been argued that holding used tires for resale would still constitute use and otherwise be excluded from the definition. Thus, the Hearing Officer concludes that the Cabinet's proffered interpretation is more consistent with the language of the statute and purpose of the program. In fact, it must also be noted that if Mr. Hull's proffered interpretation were to be adopted making usable used tires which are not currently in use to not be "waste tires," the regulatory program in its entirety would be gutted in any pragmatic sense. The Cabinet would be reduced to assessing the usable tread on all disposed tires before being able to take regulatory action.

25. As to the agricultural exemption for waste tire accumulators, the Cabinet argues that it requires more than for the waste tires to be simply accumulated on an agricultural property. Mr. Hull did not argue this point. The Hearing Officer agrees. The exemption does not apply to a person who merely accumulates waste tires "on an agricultural operation/property" but instead requires the accumulation to be "for an agricultural purpose."

[31] In other words, KRS 224.50-582(1)(b) includes within the definition of waste tires: "used tires for resale" and not "used tires for resale or reuse", which would have made the legislature's intent to exclude Mr. Hull's proffered

26. As to the requirements to establish an "agricultural purpose", the Cabinet argues KRS 446.080 must be followed and that it requires in interpreting all Kentucky statutes that: "[a]ll words and phrases shall be construed according to the common and approved usage of language... ." See Cabinet's brief at 12. The Cabinet then cites the following dictionary definition of "purpose" as follows: "the object toward which one strives or for which something exists." As to object or "objective", the Cabinet then cites the dictionary definition of that term as follows: "something that actually exists as distinguished from something thought or felt to exist...something worked toward or aspired to: goal." For these definitions, the Cabinet relied on *Webster's II New Riverside University Dictionary* (Riverside Publishing Company 1988). The Hearing Officer concludes the Cabinet's definitions are appropriate for use in evaluating Mr. Hull's claim of entitlement to the agricultural exemption at issue and has used these definitions in deciding this case.

27. While the Hearing Officer adopts the Cabinet's arguments on the interpretative issues presented on this charged violation, he notwithstanding concludes that Mr. Hull has met his burden to establish he "accumulates waste tires for an agricultural purpose" and is, thus, entitled to the exemption established by KRS 224.50-582(1), and he is not in violation of KRS 224.50-586(4). The basis for this conclusion is as follows:

a). Mr. Hull is factually entitled to the exemption even under the Cabinet's proffered interpretations. See Findings of Fact Nos. 22-28, above.

b). As noted above, the Cabinet has not promulgated any regulations to define/limit this exemption or to impose any per se percentage of use requirements over specified times in order

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interpretation more clear.

to qualify/continue to qualify for it. Use of an informal per se rule which is not promulgated as a regulation would be in violations of KRS Chapter 13A. See e.g. KRS 13A.120(6) and 13A.130.

c). While at some point of a continued lack of any use in agricultural operations, a person would become either a non-exempt accumulator of waste tires or an illegal disposer of the waste tires in violation of KRS 224.50-584(1) even without such standards being adopted, this point has not been reached in the present case.

G. Disposal of solid waste on the farm

28. As to the disposal of waste on Mr. Hull's farm without a permit, he is charged with violating KRS 224.40-100(1) and 224.40-305. The maximum civil penalty for any violations of these statutes are: "... five thousand dollars ($5,000) for said violation and an additional civil penalty not to exceed five thousand dollars ($5,000) for each day during which the violation continues... ." See KRS 224.99-010(2).

29. KRS 224.40-100(1) provides as follows:

> (1) No person shall transport to or dispose of waste at any site or facility other than a site or facility for which a permit for waste disposal has been issued by the cabinet. Upon request, any transporter of waste shall receive from the cabinet a current list of permitted waste disposal sites or facilities and shall be subsequently notified of any new permits or changes in the status of permits for waste disposal sites and facilities in the Commonwealth.

30. KRS 224.40-305 provides as follows:

> Necessity of permit.
> No person shall establish, construct, operate, maintain, or permit the use of a waste site or facility without first having obtained a permit from the cabinet pursuant to this chapter and administrative regulations adopted by the cabinet.

31. The term "waste site or facility" is defined by KRS 224.01-010 (27) as follows:

> (27) "Waste site or facility" means any place where waste is managed, processed, or disposed of by incineration, landfilling, or any other method, but does not include a container located on property where solid waste is generated and which is used solely for the purpose of collection and temporary storage of that solid waste prior to off-site disposal, or a recovered material processing facility, or the combustion of processed waste in a utility boiler;

32. The term "waste" is defined by KRS 224.01-010(31) as follows:

> (31) "Waste" means:
> (a) "Solid waste" means **any garbage, refuse, sludge, and other discarded material,** including solid, liquid, semi-solid, or contained gaseous material **resulting from** industrial, commercial, mining (excluding coal mining wastes, coal mining by-products, refuse, and overburden), **agricultural operations**, and from community activities, but does not include those materials including, but not limited to, sand, soil, rock, gravel, or bridge debris extracted as part of a public road construction project funded wholly or in part with state funds, recovered material, special wastes as designated by KRS 224.50-760, solid or dissolved material in domestic sewage, *manure, crops, crop residue, or a combination thereof which are placed on the soil for return to the soil as fertilizers or soil conditioners*, or solid or dissolved material in irrigation return flows or industrial discharges which are point sources subject to permits under Section 402 of the Federal Water Pollution Control Act, as amended (86 Stat. 880), or source, special nuclear, or by-product material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923):
> ...

[The statute then goes on to subdivide solid waste into four distinct categories and to also establish a definition for hazardous waste, which is also included in the broader definition of "waste".] The bold emphasis to show inclusion of "any garbage, refuse, sludge, and other discarded material...resulting from...agricultural operations..." is added. But see exclusion of at least some agricultural waste in the language emphasized by italics in the above definition and

the Cabinet's regulation at 401 KAR 47:100 Section 2(2), which is the Cabinet's attempt to implement this limited exclusion from waste definition for those types of agricultural waste.

33. 401 KAR 47:100 Section 2 provides as follows:

> Scope of the Permit Requirements.
> (1) ...
>
> (2). Specific exclusions. The following persons are among those who are not required to obtain solid waste site or facility permit:
>
> (a). Disposers of agricultural waste, including manures and crop residues returned to the soil as fertilizers or soil conditioners by practices common to soil conditioning, provided the wastes are used on the same farm on which they are generated.

For purposes of the Cabinet's solid waste program, the term "agricultural waste" is defined at 401 KAR 401: KAR 47:005 Section 1(9) as follows:

> any non-hazardous waste resulting from the production and processing of on-the-farm agricultural products, including manures, prunings and crop residues.

34. The term "discarded material," as used within the above definition of "waste" is not otherwise defined, but the statue does include a definition of the term "disposal." This term is defined at KRS 224.01-010(10) as follows:

> (10) "Disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any waste into or on any land or water so that such waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters;

35. The parties' respective positions on these charges are summarized in Section II B of this report, above. In addition to his general claims of exemption from the solid waste permitting requirements because of his agricultural operations, Mr. Hull also relies on arguments that the

material is being beneficially re-used and is not waste and/or that he is entitled to a **deemed** permit-by-rule (PBR) under the requirements of 401 KAR 47:150 for the particular material for which he is cited as having disposed on his farm without a permit. If Mr. Hull's activities are covered by this regulation he would not need a permit or any other registration from the Cabinet and he would not be guilty of disposing of solid waste without a permit, as charged. See and compare with 401 KAR 47:110, which covers disposal of waste activities covered by **registered** PBRs, which **do** require registration/notification to the Cabinet or would be in violation of the permitting requirements, as the controlling definition of permit does include such registrations, which are not automatic. See 401 KAR 47: 005 Section 1(112).

36. As to 401 KAR 47:150, the disposal of certain materials are deemed to have a PBR without any registration or permit from the Cabinet **if** the disposal of the material is done under the following requirements: i) the specified waste is disposed of "by a practice common to the industry"; ii) the operation is not in violation of the environmental performance standards of 401 KAR 47:030; iii) the disposal does not present a threat of imminent hazard to human health or substantial environmental impact; and iv) the disposal meets any other particular requirements imposed on the disposal of the particular material. Mr. Hull believes he is covered by this regulation because he alleges his debris piles contain covered materials: "asphalts residue"; "demolition waste" from on site demolition during demolition, if it excludes asbestos; "land clearing debris" on property where the land clearing occurred; "disposal of less than 100 tires..." "or tires **actively** used in agricultural operations";[32] "waste piles"; and, finally, "beneficial reuse

[32] This regulation, 401 KAR 47:150, preceded adoption of the Commonwealth's waste tire regulatory program and has not been modified since enactment. The parties have not argued its relevance in this case, if any. The word actively was emphasized by the undersigned.

of solid waste." See 401 KAR 47:150 Section 1 subsections (2); (5); (6); (7); and (11). However, if the requirements are not met, the person would be in violation of disposing without a permit. See definition of "permit" at 401 KAR 47:005 Section 1(112).

37. Mr. Hull is guilty of the KRS 224.40-100(1) and KRS 224.40-305 violations as charged. The basis for this conclusion is as follows:

a). See Findings of Fact 29-30 above.

b). There is no statutory exemption for even on-site disposal of solid waste resulting from agricultural operations. See statutory definition of "waste," at Conclusion No 32 above, and the emphasized language set out therein. See also KRS 224.71-140 (KAWQA not to be construed as a defense to activities requiring Cabinet permits/authorizations). Finally, see also Finding of Fact No. 5, above; and KRS 224.40-100(2). Open dumps are now strictly prohibited.

c). While there is a limited regulatory exclusion from the permitting requirements for on-site disposal of "agricultural wastes," that term is defined and is clearly limited to material such as manures, prunings and crop residues or other similar material created from the production and processing of on-the-farm agricultural products. It is a fundamental rule of statutory/regulatory construction, that when examples are given the intent was to include only other material of a similar nature. See above at Conclusion 33 for the citation to the exclusion and definition cites. Demolition debris from any source and land clearing debris, particularly from off-site are clearly not entitled to this limited exemption.

d). Mr. Hull is not entitled to a deemed PBR under 401 KAR 47:150 because of the following, which applies to all of his open dumps: i) he has not complied with the performance standards of 401 KAR 47:030, particularly in that he has provided absolutely no cover for any of

the disposed material; and ii) the material has been disposed of like material disposed of in typical open dumps and without any handling or managing consistent with any common business practice.[33] The requirements for a deemed PBR are set out in Conclusion No. 36, above.

e). In addition, as to the wood waste pile in and along the stream, it does present a threat of substantial environmental impact **and** it was generated from off-site land clearing activities. Both of these facts would also preclude a deemed PBR for that dump.

f). As to the possible deemed PBRs for activities covered by the defined "waste piles" and for the undefined "beneficial re-use of solid waste" the record does not support findings that these deemed PBRs are applicable to this case even if all of the other requirements are met, which they are not. The definition of "waste piles" is "any non-containerized accumulation of nonflowing solid waste that is **used for processing or management**." See 401 KAR 47:005 Section 1(187) and (116) (Emphasis added). Mr. Hull's argument ignores this specialized definition of waste piles, which is intended to cover waste streams where the waste is used for an ongoing process. Mr. Hull's definition, if adopted, would repeal all permitting requirements for any piles of waste/debris, which obviously was not the regulation's intent and would be contrary to the statutory mandates of KRS Chapter 224 if it were, including the absolute prohibition against open dumps. As to Mr. Hull's beneficial re-use argument, the plywood alone may be beneficially re-used once a year when the silage is blown from the wagon etc. onto the silage pile, no actual real use of the remaining material is currently being made. Mr. Hull's hopes to

[33] However, as to the wood waste dump, part of it may have been disposed of by industry standards, but this is completely unknown on this record. This would be Mr. Hull's burden of proof, as he is claiming an exemption. However, without question, it would not be up to industry standards to place material in the floodway. Therefore, the end of the dump toward and into the stream and on the stream bank would render this dump ineligible for a deemed PBR even if all the material had come from on-site, which is a separate requirement not met in this case.

"eventually" make use of it as aggregate is insufficient as a matter of law to qualify for beneficial re-use which the Hearing Officer concludes is an objective and current time use requirement. The parties did not provide any authority on this issue.

g). Finally, as to the deemed PBR issues, it must also be remembered that all of these requirements of 401 KAR 47:150 must be met to qualify for a deemed PBR and that a deficiency in any of the requirements defeat reliance on it in defense of any activity otherwise requiring a permit or registered PBR.

h). Under the above set out definitions of "waste," there is no exclusion for even 100% organic wood waste. While there are special rules for "composting," the statutory definition of that term specifically excludes the: "simple exposure of solid waste under uncontrolled conditions resulting in natural decay." See KRS 224.01-010(7). See also Burger testimony II at 39.

i). As to registered PBRs, which is covered by 401 KAR 47:080 Section 2(6) (setting out the activities which may qualify for a registered PBR) and 401 KAR 47:110 (setting out the procedure for registering), Mr. Hull did not register any of his disposal activities and would, thus, still be in violation of KRS 224.40-100(1) and KRS 224.40-305, as cited even otherwise assuming eligibility for a registered PBR for said disposal activities. The off-site demolition waste, specifically the land clearing waste,[34] would potentially qualify for a registered PBR if the disposal site is 1 acre or less. The dimensions of the organic wood fill is unknown on this record, but, of course, could not be allowed in the floodway at all and only in the unknown floodplain, if otherwise permitted by or exempted by/from the water resources branch of DOW. Finally, an

[34] Land-clearing waste is included within the definitions of construction/demolition debris and is covered by that type of solid waste site or facility permit. See 401 KAR 47:005 Section 1(35) and 401 KAR 47:080 Section 2(2).

owner or operator of a registered PBR would have to meet all the requirements specified in 401 KAR 47:110 Section 2, which includes meeting all of the environmental performance standards of 401 KAR 30:031. This includes the provision of cover to all disposed waste. See Id at Section 8. Again, the dumps on Mr. Hull's property constitute simple open dumps and have not complied with the required performance standards needed to be eligible for any registered or deemed PBRs.

j). In his post-hearing reply brief, Mr. Hull argues KRS 224.40-120 supports his position in allowing off-site construction and demolition debris waste, if the site is less than one acre. Mr. Hull misinterprets this statute. In actuality, it prohibits the Cabinet from authorizing/permitting such activity: "unless, as a minimum. the following conditions are imposed: ... " The conditions include certain obligations of the "applicant" which include, among other requirements, notice to the local governing body of the local solid waste management area and the posting of a ten thousand dollar bond ($10,000). Mr. Hull has not applied for the required permit and has not met any of the conditions thereunder. He is not entitled to the KRS 224.40-120(3) exemption from these requirements for the "beneficial reuse of industrial solid waste." See definition of "industrial solid waste" at KRS 224.01-010(31)(a)(3), which is limited to "solid waste generated by manufacturing or industrial processes... ." None of Mr. Hull's waste satisfies this definition. Mr. Hull's waste is either land clearing wood waste or is the product (concrete blocks, shingles etc.) of a manufacturing or industrial product and not a waste generated from said production. These latter products have only subsequently become waste after their use for their intended purposes and then became waste following demolition of the structures in which they were used. In addition, as to the portion of the wood waste pile which is constituted of unprocessed tree

limbs. stumps etc. and all of the remaining waste in the other piles (with the exception of the few pieces of plywood used as windbreaks once a year), the Hearing Officer has found no beneficial re-use of the material even assuming Mr. Hull's waste otherwise qualified for the exemption. Finally, this is clearly not the purpose intended to be served by the exemption and, if applied as argued by Mr. Hull, would effectively repeal many of the other statutory provisions of KRS Chapter 224 regulating the disposal of solid waste.

k). Finally, Mr. Hull has made a final argument which must be addressed. He has argued that he cannot be an unpermitted "solid waste site or facility" as defined above because his debris/solid waste piles cannot meet the definition of "landfill," as used within the Cabinet's solid waste program and which assumes it to be a permitted site meeting the required performance standards. Again, Mr. Hull's debris/solid waste piles are clear open dumps prohibited by KRS 224.40-100(2). It is the clear intent of the legislature for those disposing of solid waste in open dumps and or for those establishing/maintaining open dumps to be guilty of violating KRS 224.40-100(1) and 224.40-305. By definition, an open dump cannot be a permitted site and is not included within the list of those solid waste sites or facilities which are capable of being permitted.

l). Thus, in summary as to these violations, Mr. Hull is guilty as charged of open dumping and maintaining open dumps.

38. Pursuant to KRS 224.10-100(18) and KRS 224.40-100(3), Mr. Hull should be ordered to clean up all of his open dumps and to properly dispose of all of the solid waste therein at permitted facilities and to provide documentation or other evidence to the Cabinet showing

disposal at such permitted facilities and/or to otherwise come into compliance with the Commonwealth's laws regulating the disposal of solid waste.

39. As to an appropriate civil penalty for the above violations, the Hearing Officer concludes an appropriate civil penalty is the total sum of three thousand dollars ($3,000). The basis for this conclusion is as follows:

a). With the exception of the wood waste pile adjacent to and into the stream, the other waste piles are not environmentally serious, are relatively small, and apparently were generated from on site/farm demolition activities. While Mr. Hull is not making any significant beneficial re-use of the materials therein, his character is such that he cannot envision said material will not be of benefit to him in the future and this has colored his judgment in the maintaining of these open dumps. See also Finding of Fact No. 5, above, which also warrants a downward mitigation of an appropriate civil penalty for these dumps. Thus, the Hearing Officer concludes that an appropriate civil penalty in the amount of five hundred dollars ($500) for these dumps, in total, is appropriate

b). The wood waste pile, which extends partially into the stream and onto the stream banks is much more environmentally serious. Mr. Hull has allowed others in the business to dump their wood waste on his property. It is possible, but not established, that he received monetary benefit from allowing such dumping. While the actual days of dumping for these violations is unknown, thus eliminating the number of days KRS 224.40-100(1) can be cited as violated, this open dump has been established to be in existence from at least June 18, 2002 (and earlier but not cited earlier) through the close of the formal evidentiary record on July 30, 2003.

Each of the days in-between may also be subjected to separate civil penalties for ongoing violations of KRS 224.40-305.

c). However, and perhaps based only on luck, no significant environmental harm is yet known to have occurred from this wood waste pile. Given that factor and some additional relevant factors which also mitigate downward an appropriate civil penalty even for this wood waste permitting violation, the Hearing Officer concludes an appropriate civil penalty for this permitting violation is the total sum of two thousand five hundred dollars ($2,500), which represents half of a one-day maximum civil penalty for said violation. These additional relevant downward mitigating factors are as follows: that the environmental seriousness is caused solely by this waste being in the floodway, which is separately penalized below; that Mr. Hull has no prior record of environmental violations; iii) that it is not known that he, in fact, received any remuneration for allowing this dumping to occur but may have been motivated solely by his desire for the fill in this area; and iv) while his absolute income and resources are not known, the record supports an inference that more likely than not this will be a **very substantial** civil penalty on Mr. Hull, after factoring in the further penalty recommended below. This is based on his extremely limited farm income and his part time work in a lawn mower shop.

d). In addition, the costs of remediation are likely to be substantial, particularly the costs of disposal of all the waste at permitted facilities. This is even assuming he is able to personally perform the work of getting this waste to the permitted site, which is unlikely given his medical condition which precludes driving/sitting for long periods.

e). Mr. Hull is entitled to no reduction of civil penalties for good faith in that he has not yet remediated the violations. This is based on his erroneous, as concluded by the undersigned

Hearing Officer, but good faith belief that he is not in any violation of the Commonwealth's environmental laws.

H. Failure to take required remedial measures to control disease vectors (mosquitoes) at the waste sites

40. In addition to maintaining a solid waste site or facility without a required permit, Mr. Hull is cited with violating 401 KAR 47:030 Section 9, which establishes one of the substantive performance standards required for such a facility. The maximum civil penalty for any violations of this regulation is "... five thousand dollars ($5,000) for said violation and an additional civil penalty not to exceed five thousand dollars ($5,000) for each day during which the violation continues... ." See KRS 224.99-010(2). The regulation cited as violated, 401 KAR 47:030 Section 9, provides as follows:

> Section 9. Disease. (1) Disease vectors. No solid waste site or facility shall exist or occur unless the on-site population of disease vectors is prevented or controlled through the periodic application of cover material or other techniques as appropriate to protect human health and the environment…

41. The term "disease vector" is defined at 401 KAR 47:005 Section 1(47) as follows:

> (47) “Disease vector” means all insects, birds or gnawing animals such as rats, mice or ground squirrels, which are capable of transmitting pathogens.

42. While this substantive performance standard applies to the disposal of all solid waste, the parties in this action limited their practice of this case to the waste tires. See Finding of Fact No. 33, above. It is appropriate for the undersigned to do the same. However, the failure to provide cover to all of the solid waste was appropriately considered in the above claims dealing

with the solid waste permitting issues. The parties' respective positions on this charge is summarized in Section II C of this report, above.

43. Notwithstanding the presence of some waste pneumatic tires on Mr. Hull's farm which are not receiving the application of any disease vector control measures, see Finding of fact No. 38 above, Mr. Hull is not guilty of the violations charged. The basis for this Conclusion is as follows:

a). As concluded/found above, Mr. Hull is exempt from the requirements of the Commonwealth's waste tire program as an accumulator of waste tires for an agricultural purpose. KRS 224.50-584(1).

b). The waste tire program was originally enacted in 1992 and was later modified and re-established in 1998 using the current statutory language. The 1998 enactment, at least, shows a clear legislative intent to exempt otherwise exempt agricultural accumulators from the disease vector control measure requirements. See and compare the agricultural exemption at KRS 224.50-584(1) with the other exemptions established by subsections (2) and (3) of that statute, which would require vector control measures for waste tires under those exemptions. There is no such language in the agricultural exemption. See also KRS 224.50-860. (Making certain standards, including the one at issue applicable only to those required to register under the waste tire program).

c). While the Cabinet's witnesses, particularly Mr. Gilbert, testified that the performance standards of 401 KAR 47:030 and particularly its requirement for cover apply to waste tires for an agricultural accumulator exempt from the waste tire program requirements, he did not provide any authority for said testimony. See II at 186. The regulation cited above in discussing deemed

PBRs would be such authority. See 401 KAR 47:150 Section 1(7). However, that regulation was enacted in 1990 and has not been modified or changed following enactment of the Commonwealth's waste tire program. As to the one and only enforcement example provided by Mr. Gilbert in his testimony as to the Cabinet applying this standard to a farmer using the tires for an agricultural purpose, the record does not establish when this occurred and whether it pre-dated or post-dated the current statutory language in the waste tire program. Thus. the one example is not persuasive as supporting the Cabinet's proffered interpretation.

d). The statutory enactment, which is specific and enacted later in time than the regulation must be followed. The regulation would still apply to disposed tires but not to those currently entitled to the agricultural exemption to the Commonwealth's waste tire program. It is probable by the express language used and not used for the various exemptions in the statute that the General Assembly affirmatively decided such disease vector control was not needed or desired by policy considerations for agricultural operations, which tend to be isolated; would be impractical for legitimate agricultural uses, and/or the vectors sufficiently controlled by natural measures/predators more prevalent on the farm.

I. Failure to characterize/correct a petroleum release to the environment

44. As to Mr. Hull's spilled "diesel fuel" on his farm, he is charged with violating KRS 224.01-405 for allegedly not characterizing the extent of release and taking any necessary corrective action. The maximum civil penalty for any violations of this statute is: "... one thousand dollars ($1,000) for said violation and an additional civil penalty not to exceed one thousand dollars ($1,000) for each day during which the violation continues... ." See KRS 224.99-010(8). The statute cited as violated, KRS 224.01-405, provides as follows:

224.01-405 Corrective action for release of petroleum or petroleum product from a source other than a petroleum storage tank

(1) In the event of a release to the environment of petroleum or a petroleum product from a source other than a petroleum storage tank,[35] any person who owns or operates the source from which the release occurred or any person who caused the release shall characterize the extent of the release as necessary to determine the effect of the release on the environment and shall perform corrective action. "Corrective action" means those actions necessary to protect human health, safety, and the environment in the event of a release of petroleum or petroleum product from a source other than a petroleum storage tank. "Corrective action" includes remedial actions to clean up contaminated groundwater, surface waters, sediments, and soil; actions to address residual effects after initial corrective action is taken; and actions taken to restore or replace potable water supplies. "Corrective action" also includes actions necessary to monitor, assess, and evaluate a release, as well as actions necessary to monitor, assess, and evaluate the effectiveness of remedial action after a release has occurred.

(2) The cabinet shall, by administrative regulation, establish standards and procedures for the performance of corrective action in the event of a release of petroleum or petroleum products from a source other than a petroleum storage tank. The standards shall adequately protect human health, safety, and the environment. The standards and procedures shall be consistent with the standards and procedures for corrective action in the event of a release from a petroleum storage tank, taking into account the differences in exposure due to the source of the release. The administrative regulations shall allow use of the options established in KRS 224.01-400(18).

(3) Until the administrative regulations required by subsection (2) of this section are adopted, the cabinet shall allow a person required to take corrective action in the event of a release of petroleum or petroleum products from a source other than a petroleum storage tank to use the options and provisions established in KRS 224.01-400(18) to (21). The cabinet shall approve use of the corrective action option after ensuring that implementation will adequately protect human health, safety, and the environment. [Note added].

[35] By definition later in KRS Chapter 224, petroleum storage tanks are defined as "underground storage tanks." See KRS 224, Subchapter 60. Thus, a release of petroleum or petroleum product from the source(s) involved in this action would be covered under this statute, KRS 224.01-405.

45. The Cabinet has not adopted any regulations to further implement the provisions of KRS 224.01-405 and, thus, the provisions of KRS 224.01-400(18)-(21) referenced therein are applicable to petroleum releases. KRS 224.01-400(18)-(21) provide as follows:

> (18) Any person possessing or controlling a hazardous substance, pollutant, or contaminant which is released to the environment, or any person who caused a release to the environment of a hazardous substance, pollutant, or contaminant, shall characterize the extent of the release as necessary to determine the effect of the release on the environment, and shall take actions necessary to correct the effect of the release on the environment. Any person required to take action under this subsection shall have the following options:
>
> (a) Demonstrating that no action is necessary to protect human health, safety, and the environment;
>
> (b) Managing the release in a manner that controls and minimizes the harmful effects of the release and protects human health, safety, and the environment, provided that the management may include any existing or proposed engineering or institutional controls and the maintenance of those controls;
>
> (c) Restoring the environment through the removal of the hazardous substance, pollutant, or contaminant; or
>
> (d) Any combination of paragraphs (a) to (c) of this subsection.
>
> (19) Unless otherwise required by the cabinet, a person required to characterize the extent of a release and correct the effect of the release on the environment under subsection (18) of this section may take those actions without making the demonstrations to the cabinet required by subsections (18) to (21) of this section, if:
>
> (a) The release is less than the reportable quantity of a hazardous substance, pollutant, or contaminant;
>
> (b) The release is of a pollutant or contaminant for which a reportable quantity has not been established by administrative regulation promulgated pursuant to subsection (2) of this section, if the release does not present an imminent or substantial danger to the public health or welfare; or
>
> (c) The release is authorized by a state or federal permit.
>
> (20) If a person required to take action under subsection (18) of this section demonstrates to the cabinet that, pursuant to subsection (18)(a) of this section, no action is necessary to protect human health, safety, and the environment or, pursuant to subsection (18)(b) of this section, the release will be managed in a manner that controls and minimizes the harmful effects of the release and protects human health, safety, and the environment, the cabinet shall not require restoration of the environment

through the removal of the hazardous substance, pollutant, or contaminant pursuant to subsection (18)(c) of this section.

(21) A person required to take action under subsection (18) of this section who does not restore the environment through removal of the hazardous substance, pollutant, or contaminant in accordance with subsection (18)(c) of this section shall demonstrate to the cabinet that the remedy is protective of human health, safety, and the environment, by considering the following factors:

(a) The characteristics of the substance, pollutant, or contaminant, including its toxicity, persistence, environmental fate and transport dynamics, bioaccumulation, biomagnification, and potential for synergistic interaction and with specific reference to the environment into which the substance, pollutant, or contaminant has been released;

(b) The hydrogeologic characteristics of the facility and the surrounding area;

(c) The proximity, quality, and current and future uses of surface water and groundwater;

(d) The potential effects of residual contamination of potentially impacted surface water and groundwater;

(e) The chronic and acute health effects and environmental consequences to terrestrial and aquatic life of exposure to the hazardous substance, pollutant, or contaminant through direct and indirect pathways;

(f) An exposure assessment; and

(g) All other available information.

46. See KRS 224.01-400(11) for the reporting quantity thresholds for petroleum product (25 gallons or more in a 24-hour period) or diesel fuel (75 gallons or more in a 24-hour period). In the present case, Mr., Hull was not cited for any failure to report and any release was well below the reportable quantities. While the undersigned agrees with the Cabinet that a release below reporting thresholds is still covered by KRS 224.01-405 and is not a per se defense to violations of said statute, said fact allows the responsible person the no action needed option of KRS 224.01-400(19), if appropriate, **and** if further characterization/corrective action is not otherwise required by the Cabinet. (Mr. Hull's recognized authority, the Producer's Workbook or

"PW" under KAWQA even recognizes the duty to characterize/correct is imposed even if the spill/release is below reporting thresholds. See PW at 43-44.) In the present case, the Cabinet in its NOV required only for Mr. Hull to: "properly dispose of all waste oil and provide disposal receipts." See Cabinet's exhibit 3. If further characterization/corrective action is now required by the Cabinet, it did not provide any basis for its change in required remedial actions. Of course, it would be Mr. Hull's burden to establish the no action option is appropriate to protect human health, safety, or the environment, assuming the statute applies by nature of a petroleum release.[36]

47. The parties' respective positions on this charge are summarized in Section II D of this report, above. However, as to this alleged violation, the parties have also raised several legal/factual issues as to the proper scope of the charge (whether charge is limited to the one leaking storage barrel or can include other possible petroleum sources as well as the fuel tanker truck) and available defense (claim by Mr. Hull that the material is biodiesel). On these issues, the undersigned concludes that it is appropriate as a matter of law to limit the Cabinet's claim to the single source of alleged petroleum product release (the storage barrel) and to exclude consideration of the other alleged sources (driveway stain and fuel tanker truck); and to allow Mr. Hull to raise his defense that the material was not a petroleum based product. See Findings 39-41 for the basis for this conclusion.

[36] On these issues, he relies on the very small quantity released and his testimony that the material is not harmful to the environment and has not even had any adverse impact on the vegetation at the spill location. He also questions whether the Cabinet forces the issue on every small release of oil from someone's car on a driveway, which would be comparable to this release assuming it to be petroleum based.

48. The Cabinet did not meet its burden to establish a release of petroleum or petroleum based product and, thus, the alleged violation of KRS 224.01-405 must be dismissed. The basis for this Conclusion is Finding of Fact No. 46, above.

J. Lead acid batteries

49. As to Mr. Hull's lead acid batteries on his farm, he is charged with violating KRS 224.50-410 for allegedly not properly disposing of said batteries. The maximum civil penalty for any violations of this statute is: "... one thousand dollars ($1,000) for said violation and an additional civil penalty not to exceed one thousand dollars ($1,000) for each day during which the violation continues... ." See KRS 224.99-010(8). KRS 224.50-410, in its entirety, provides as follows:

> 224.50-410 Disposal of lead acid batteries
> (1) No person shall knowingly:
> (a) Dispose of lead acid batteries by placing them in mixed solid waste;
> (b) Accept lead acid batteries for disposal in a landfill or an incinerator; or
> (c) Discard or abandon a lead acid battery in any manner except as allowed by subsection (2) of this section.
> (2) Proper disposal of lead acid batteries shall mean delivery to:
> (a) A retail seller of new lead acid batteries;
> (b) A person who sells lead acid batteries at wholesale;
> (c) A permitted secondary lead smelter;
> (d) A facility which will recycle the batteries by extracting the lead and chemical components for reuse; or
> (e) A collection center which delivers to a smelter or a recycling facility.

50. The term "disposal" for purposes of KRS Chapter 224 is defined at KRS 224.01-010(10) and was set out above in Conclusion No. 34. The term "knowingly" is not specifically defined and must be give its common everyday meaning. However, the parties disagree as to whether it requires simple knowledge of doing the acts charged (Mr. Hull knew he placed the

unusable batteries on the other mixed waste for later disposal to an authorized person) or knowledge as to the law, which could possibly be construed to treat this act as being "disposal" particularly as the batteries were not containerized and were open to the environment. (As a matter of law, the temporary storage of solid waste for later proper disposal would not be considered to be disposal because it would not be considered to be a "waste site or facility" by definition. See definition above at Conclusion No. 31).

51. The parties' respective positions on this charge are further summarized in Section II E of this report, above.

52. While this issue is somewhat close because the statutory definition of "disposal" is so broad and arguably could even cover Mr. Hull's knowing act in this case, on balance, the Cabinet did not meet its burden to establish a knowing disposal of lead acid batteries by Mr. Hull. Thus, the alleged violation of KRS 224.50-410 must be dismissed. The basis for this Conclusion is as follows:

a). See Findings of Fact Nos. 47-50, above.

b). The record is certainly clear that the batteries had not been finally or permanently disposed of at this location but, in fact, were clearly being stored there only temporarily for later authorized disposal. The Hearing Officer has no doubt of this fact on this record. The parties did not provide any authority as to any permanency requirement for "disposal," which term does imply it in the term's common usage but not necessarily in its statutory definition. Thus, it is not clear how temporary outside storage is to be treated under the definition. (As noted above, the term "discarded" material as used within the definition of "waste" is not defined).

c). The statutory term focuses more on the potential of release of waste material into the environment. Thus, this conclusion could be different if the record established that, in fact, the batteries had lost physical integrity and were releasing contents into the environment or had been deposited there for an inordinate length of time and thereby increasing the likelihood of such a release occurring. While in this case the Cabinet saw something below one of the batteries, they did not check these batteries' integrity or allege any actual release and the record does not establish the length of time these batteries had been temporarily stored for later disposal.

d). The General Assembly did add the additional element requiring the disposal for this particular violation to be a "knowing" disposal. On balance, considering the above and this additional element, the undersigned concludes that it would be unjust and against the intent of the General Assembly to affirm this violation when it is clear that these batteries were merely being temporarily stored for later proper disposal.

e). Finally, it is clear that use of lead acid batteries on farms is a common practice. However, it is not clear whether such use exposes them routinely to the outside environment during such active use. It is also not clear what the common practice is as to temporary storage of such batteries after their useful life expires and prior to their proper disposal under KRS 224.50-410.[37] These are issues that arguably affect or relate to a proper determination as whether a farmer has "knowingly disposed" of such batteries. Of course, releases of the batteries' contents at any time while in active use or not are subject to the requirements of KRS 224.01-400.

[37] While not argued by Mr. Hull in this case, the Cabinet's own publication is also ambiguous on this issue. See PW at 46. As to disposal of lead acid batteries, this publication says it is illegal to take them to a licensed landfill or to dump them within 150' of a well, but not to dump at the site beyond 150' of a water source. However, it does list such dumping as being of "moderate to high risk." Of course on this issue, KRS 224.50-410 controls and prevents disposal of lead acid batteries on farms.

K. Placing of fill material (wood waste) in or along a stream

53. As to Mr. Hull's placing of fill material in or along a stream, he is charged with violating KRS 151.250 and 401 KAR 4:060 Sections 2 and 3, for not having a Cabinet approved permit for said activity; and 401 KAR 5:031 Section 2(1) for degrading the waters of the stream allegedly in violation of the minimal standards established by said regulation from the placed material allegedly entering the stream.

54. As to the obviously merged alleged failure to have a permit violation of KRS 151.250/401 KAR 4:060, a person who violates that statute is subject to a civil penalty of no more than one thousand dollars ($1,000) and "[e]ach day upon which such violation occurs or continues shall constitute a separate offense." See KRS 151.990(1).

55. As to the alleged water quality violation of 401 KAR 5:031 Section 2(1), a person who violates that regulation is subject to a civil penalty of no more than twenty-five thousand dollars ($25,000) "...for each day during which such violation continues... ." See KRS 224.99-010(2).

56. Finally, as noted above, this activity was also cited by the Cabinet's DWM for violating the disposal of solid waste and/or maintaining a solid waste site or facility without a permit. However, not previously addressed above, was DWM's citation for allegedly violating a separate substantive performance standard for such sites/facilities by this activity which is established at 401 KAR 47:030 Section 2. This standard is similar to the alleged DOW cited violation of KRS 151.250 by this activity. As noted above, violations of the substantive performance standards for solid waste sites or facilities are subject to a civil penalty not to exceed "... five thousand dollars ($5,000) for said violation and an additional civil penalty not to

exceed five thousand dollars ($5,000) for each day during which the violation continues... ." See KRS 224.99-010(2).

57. KRS 151.250, in its entirety, provides as follows:

> 151.250 Plans for dams, levees, etc. to be approved and permit issued by cabinet; jurisdiction of Bureau of Surface Mining
>
> (1) Notwithstanding any other provision of law, no person and no city, county, or other political subdivision of the state, including levee districts, drainage districts, flood control districts or systems, or similar bodies, shall commence the construction, reconstruction, relocation or improvement of any dam, embankment, levee, dike, bridge, fill or other obstruction (except those constructed by the Department of Highways) across or along any stream, or in the floodway of any stream, unless the plans and specifications for such work have been submitted by the person or political subdivision responsible for the construction, reconstruction or improvement and such plans and specifications have been approved in writing by the cabinet and a permit issued. However, the cabinet by regulation may exempt those dams, embankments or other obstructions which are not of such size or type as to require approval by the cabinet in the interest of safety or retention of water supply.
>
> (2) No person, city, county or other political subdivision of the state shall commence the filling of any area with earth, debris, or any other material, or raise the level of any area in any manner, or place a building, barrier or obstruction of any sort on any area located adjacent to a river or stream or in the floodway of the stream so that such filling, raising or obstruction will in any way affect the flow of water in the channel or in the floodway of the stream unless plans and specifications for such work have been submitted to and approved by the cabinet and a permit issued as required in subsection (1) above.
>
> (3) Nothing in this section is intended to give the cabinet any jurisdiction or control over the construction, reconstruction, improvement, enlargement, maintenance or operation of any drainage district, ditch, or system established for agricultural purposes, or to require approval of the same except where such obstruction of the stream or floodway is determined by the cabinet to be a detriment or hindrance to the beneficial use of water resources in the area, and the person or political subdivision in control thereof so notified. The Kentucky Bureau of Surface Mining through KRS Chapter 350 shall have exclusive jurisdiction over KRS Chapter 151 concerning the regulation of dams, levees, embankments, dikes, bridges, fills, or other obstructions across or along any stream or in the floodway of any stream which structures are permitted under KRS Chapter 350 for surface coal mining operations.

58. 401 KAR 4:060 Section 2 provides as follows:

> Section 2. Applicability. This administrative regulation shall apply to all construction across, **along, or adjacent** to a stream **(i.e., the base floodplain) or** in the **floodway** of a stream for which a construction permit is required pursuant to KRS 151.250, except for the construction of dams as defined in KRS 151.100. [Emphasis added]

Thus, a precondition for requiring a KRS 151.250 permit is for the construction to be either across the stream or in the floodplain, which by definition would include the floodway. It is the Cabinet's burden in an enforcement action to establish the person cited has, in fact, constructed within the floodplain. It is not sufficient to merely show the construction is near a stream. The statutory terms have been defined by this regulation.

59. The terms "base floodplain" and "base flood" are defined at 401 KAR Section 1 (2) and (3) as follows:

> (2) “Base Flood” means the flood having a one (1) percent chance of being equaled or exceeded in any given year, also called the 1100-year frequency flood.
>
> (3) “Base floodplain” means the area along, adjacent to, and including a stream, which is inundated by the base flood on that stream.

60. As to 401 KAR 4:060 Section 3, it set outs the detailed provisions and procedures required for issuance of the permits contemplated by KRS 151.250. This regulation does not need to be set out for purpose of this analysis. However, as noted before, this regulation and the regulations in total do not address the scope or procedures for exemptions established by KRS 151.250(3). In contrast, the authority given the Cabinet in KRS 151.250(1) to exempt certain

structures "which are not of such size or type as to require approval by the cabinet in the interest of safety or retention of water supply" has been exercised by the Cabinet through the adoption of 401 KAR 4:050, which applies only to structure construction in streams whose watersheds are less than one square mile or for subfluvial utility or pipeline crossings, if certain conditions are met.

61. 401 KAR 5:031 Section 2(1) provides as follows:

> Section 2. Minimum Criteria Applicable to All Surface Waters. (1) The following minimum water quality criteria are applicable to all surface waters including mixing zones, with the exception that toxicity to aquatic life in mixing zones shall be subject to the provisions of 401 KAR 5:029, Section 4. Surface waters shall not be aesthetically or otherwise degraded by substances that:
> (a) Settle to form objectionable deposits;
> (b) Float as debris, scum, oil, or other matter to form a nuisance;
> (c) Produce objectionable color, odor, taste, or turbidity;
> ... [The other standards would not apply in this case].

62. 401 KAR 47: 030 Section 2 provides as follows:

> Section 2. Flood Plains. No solid waste site or facility shall restrict the flow of the 100 year flood, reduce the temporary water storage capacity of the flood plain, or be placed in a manner likely to result in washout of waste, so as to pose a hazard to human health, wildlife, or land or water resources.

63. The parties' respective positions on these charges are summarized in Section II F of this report, above.

64. The record supports a conclusion that Mr. Hull is guilty of the following violations, as charged: KRS 151.250/401 KAR 4:060 Sections 2 and 3 (for not having a KRS 151.250 permit for at least a portion of the fill activity); 401 KAR 47: 030 Section 2 (for disposal of waste/wood fill in a manner likely to result in a wash-out of said waste into a stream); and 401

KAR 5:031 Section 2(1) (for minor aesthetic degradation of the water in the stream by the wood waste)[38]. The basis for this Conclusion is as follows:

a). See Findings of Fact 51-60, above.

b). The Hearing Officer need not and does not address the interpretative issue he raised as to KRS 151.250(3). For at least a portion of the fill, no agricultural purpose is established. As to that portion of the fill all of the interpretative issues are moot. This includes all fill material in the stream, all fill material on the stream bank, and all fill material in an area which would be excluded for feeding operations by the BMPs required under KAWQA. This also includes all portions of the fill made up of unprocessed wood, large pieces of trees, and stumps, which of course cannot be used as a level staging area for cattle feeding pens or for any other agricultural purpose.

c). However, even assuming the broadest possible interpretation of the KRS 151.250(3) agricultural exemption and even assuming the entire fill area was shown to be for an agricultural purpose, the exemption is not absolute. The fill, as currently constituted, has been determined by the Cabinet and is determined by the undersigned to be "... a detriment or hindrance to the beneficial use of water resources in the area,... ." The overall stability of the fill is unknown on this record but the fill is clearly unrestrained and is placed in a manner likely to lead to a wash-

[38] In addition to the wood waste, the Cabinet also argues the engine head in the stream, see Cabinet exhibit 8, at 9, as also being in violation of 401 KAR 5:031. As to that portion of the charge, the undersigned concludes Mr. Hull is not guilty. The record establishes Mr. Hull is not responsible for this engine head getting dumped into the stream. It was dumped into the stream from an unknown person from the county road, which passes over the stream. This disposal was not cited by DWM for illegal disposal and KRS 224.43-020 is an absolute defense to such charge. The undersigned concludes that for a person to be responsible for a degradation of the water quality criteria of 401 KAR 5:031, that KRS 224.70-110 requires the cited person to have some responsibility for the discharge. Since removal of said head from the stream would be of obvious environmental benefit and may be within the capability of Mr. Hull to perform personally (or with help of his children), the parties may want to consider negotiating its removal and proper disposal as a supplemental environmental project to be performed by Mr. Hull in lieu of some amount of the civil penalties otherwise imposed by this recommendation.

out of the waste into the stream. This potentially could clog/dam the stream and eliminate all beneficial uses downstream and cause backwater effect upstream. Finally, on this issue, even assuming the Cabinet determination must come first prior to any violation of KRS 151.250 being established, Mr. Hull has taken no action following issuance of the NOVs and clearly sufficient time has expired for said action to be taken. Thus, there is also no need to address the proper procedures for KRS 151.250 exemptions and whether exemptions must be requested and approved prior to any construction activity.

d). In addition, whatever the scope of the agricultural exemption established by KRS 151.250(3), it does not apply to the disposal of waste and the requirements of 401 KAR 47:030 Section 2.

e). As to the extent of the amount of fill necessary to be removed as part of the required remedial actions, all of the waste must be removed as part of Mr. Hull's correction of the solid waste permitting violations also regardless of the KRS 151.250 interpretative issues presented. and the requirements of KRS Chapter 224. While Mr. Hull may be able to apply for retention of a **portion** of the fill material, as a construction demolition debris landfill, DWM would require compliance with its own floodplain requirements and the remaining fill would have to be found by the Cabinet not to present any hazard to the stream or to violate 401 KAR 47:030 Section 2.

65. Pursuant to KRS 224.10-100(18) and KRS 224.40-100(3), Mr. Hull should be ordered to perform all measures needed to fully abate the above-described violations.

66. As to an appropriate civil penalty for the above violations, the Hearing Officer concludes an appropriate civil penalty is the total sum of five thousand five hundred dollars ($5,500). The basis for this conclusion is as follows:

a). This is a one thousand dollar ($1,000) civil penalty for the violations of KRS 151.250/401 KAR 4:060 Sections 2 and 3, which represents a one-day maximum civil penalty for said violations; a four thousand dollar ($4,000) civil penalty for the violation of 401 KAR 47:030 Section 2, which represents a one day maximum for said violation minus a credit for the activity, as penalized by DOW; and a civil penalty of five hundred dollars ($500) for the violation of 401 KAR 5:031 Section 2(1)/KRS 224.70-110, which is a small fraction of the maximum civil penalty allowable for said violation but is reasonable given the slight nature of the environmental harm caused by said violation.

b). See also the factors discussed above in Conclusion 39, which are also applicable to assessing an appropriate civil penalty for these violations.

c). Notwithstanding the nature of the material, which is not environmentally hazardous or of particular concern since it is simple wood waste, a substantial civil penalty must be imposed for the wood waste fill activity, since it has a significant potential for seriously impacting water resources. However, a more substantial civil penalty is not warranted because little environmental harm has yet to occur, the violations can largely be remediated, Mr. Hull has no history of prior environmental violations, and as noted above, these (and in fact any) civil penalties are likely to be very substantial to Mr. Hull.

L. Having an unpermitted discharge (straight pipe or ditch) of human sewage from the farmhouse into the creek

67. Mr. Hull is alleged to be in violation of KRS 224.70-110/401 KAR 5:055 for having an unpermitted discharge of sewage from his home; in violation of KRS 224.70-110/401 KAR 5:060 because of the discharge; and, finally, in violation of KRS 224.70-110/401 KAR 5:065 for

discharging pollutants which would not meet permit limits. A person who violates this statute and these regulations are subject to civil penalties of no more than twenty-five thousand dollars ($25,000) for each violation "...for each day during which such violation continues... ." See KRS 224.99-010(2).

68. KRS 224.70-110 is the Commonwealth's general statutory prohibition against water pollution and provides, in its entirety as follows:

> 224.70-110 General prohibition against water pollution
> No person shall, directly or indirectly, throw, drain, run or otherwise discharge into any of the waters of the Commonwealth, or cause, permit or suffer to be thrown, drained, run or otherwise discharged into such waters any pollutant, or any substance that shall cause or contribute to the pollution of the waters of the Commonwealth in contravention of the standards adopted by the cabinet or in contravention of any of the rules, regulations, permits, or orders of the cabinet or in contravention of any of the provisions of this chapter.

69. Regulation 401 KAR 5:055 requires a permit, known as a Kentucky Pollutions Discharge Elimination (KPDES) permit in the Commonwealth, for a person "to discharge pollutants from a point source into waters of the Commonwealth." See Id at Section 1. The term "point source" is defined at 401 KAR 5:002 Section 1(220) as follows:

> (220) “Point source” means any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, or concentrated animal feeding operation, from which pollutants are or may be discharged. The term does not include agricultural storm water run-off or return flows from irrigated agriculture.

See also *Morgan v. NREPC,* 6 SW 3d 833 (Ky. App. 1999), which establishes a broad application of the phrase "discharges into waters of the Commonwealth," which would certainly cover the discharge of sewage into a drainway of a nearby creek.

70. Regulation 401 KAR 5:060 establishes the application requirements for KPDES permits and at Section 2 of the regulation imposes a duty to apply on any person who discharges or proposes to discharge pollutants. For purposes of this report, this alleged violation should be merged with the alleged violation of 401 KAR 5:055, as they are established by the exact same elements.

71. Regulation 401 KAR 5:065 establishes KPDES permit conditions, including the standards applying to the water quality/effluent limitations of the water discharged. The straight discharge of human sewage, without treatment would be in violation of these standards.

72. The Cabinet did not meet its burden to establish any discharge of human sewage and, thus, all of these alleged violations must be dismissed. The basis for this Conclusion is as follows:

a). See Finding of Fact No. 65, above.

b). Any water pollution resulting from Mr. Hull's cattle would have to be cited under and follow the procedures of KAWQA, above.

73. However, further investigation of this issue, including the Cabinet performing a dye test on Mr. Hull's system, is warranted on this record. See KRS 224.10-100(10).

VI. RECOMMENDATIONS

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends that the Secretary enter the attached proposed Order as her Final Order in this case. The proposed Order is consistent with the above report.

VII. RIGHT TO FILE EXCEPTIONS

Pursuant to KRS 224.10-440 and KRS 151.184 any party may file exceptions to this Report and Recommendation within fourteen (14) days of receipt of this Report. The Secretary will then consider this report, any exceptions, and the recommended order and decide this case.

So RECOMMENDED this the _____ day of _____, 2004.

___//S//[09/15/2004]_____
STEVE BLANTON, HEARING OFFICER
OFFICE OF ADMINISTRATIVE HEARINGS
35-36 Fountain Place
Frankfort, Kentucky 40601
Telephone: (502) 564-7312
Fax: (502) 564-4973

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing ORDER was, on this _____ day of _____ 2004 mailed by first-class mail, postage prepaid to:

HON DANIEL HULL
9538 BARRS BRANCH RD
ALEXANDRIA KY 41001

HON DANIEL HULL
4555 BARRS BRANCH RD
ALEXANDRIA KY 41001

and hand-delivered to:

HON RICHARD W. BERTELSON, III
Environmental and Public Protection Cabinet
Office of Legal Services
Fifth Floor, Capital Plaza Tower
Frankfort, KY 40601

_____
DOCKET COORDINATOR

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COMMONWEALTH OF KENTUCKY
ENVIRONMENTAL AND PUBLIC PROTECTION CABINET
FILE NOS. DOW-25904-039 & DWM-25904-039; and
DOW-25924-039 & DWM-25924-039

DAN HULL

PETITIONER

VS. **SECRETARY'S FINAL ORDER**

ENVIRONMENTAL AND PUBLIC
PROTECTION CABINET

RESPONDENT

* * * * * * * * *

THIS MATTER is before the Secretary on the Report and Recommendation of the Hearing Officer. Having considered the Hearing Officer's Report and Recommendation and any exceptions thereto, and being otherwise sufficiently advised, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The Hearing Officer's Report and Recommendation filed on ___[09/15/2004]___, 200___, is hereby incorporated by reference as if fully stated herein.

2. As to the Division of Waste Management's (DWM's) Notice of Violation (NOV) issued to Dan Hull on June 24, 2002 (NOV Tracking # 4618) Dan Hull is adjudicated to be **GUILTY** of the violations nos. 3/4 (KRS 224.40-100/KRS 224.40-305); and 5 (401 KAR 47:030 Section 2), as cited therein; and **NOT GUILTY** of all of the remaining violations cited therein, which are nos. 1 (KRS 224.50-856 (4)); 2 (401 KAR 47:030 Section 9); 6 (KRS 224.01-405); and 7 (KRS 224.50-410(2)).

3. As to the Division of Water's (DOW's) Notice of Violation (NOV) issued to Dan Hull on June 27, 2002 (NOV Tracking # 4615) Dan Hull is adjudicated to be **GUILTY** of the violations nos. 1 (KRS 151.250/401 KAR 4:060 Sections 2 and 3); and 2 (KRS 224.70-110/401

KAR 5:031 Section 2(1)) as cited therein; and **NOT GUILTY** of all of the remaining violations cited therein, which are nos. 3(KRS 224.70-110/401 KAR 5:055); 4(KRS 224.70-110/401 KAR 5:060); and 5(KRS 224.70-110/401 KAR 5:065).

4. Dan Hull is hereby **ASSESSED** and **ORDERED** to pay a total civil penalty in the amount of eight thousand five hundred dollars ($8,500) for the above violations of which he is adjudicated to be guilty. This is based on the following assessments: for the violations of KRS 224.40-100/KRS 224.40-305 a total of three thousand dollars ($3,000), representing a total of five hundred dollars ($500) for the four piles of predominantly demolition type debris; and two thousand five hundred dollars ($2,500) for the wood waste pile adjacent to Barrs Branch Creek); for the violation of 401 KAR 47:030 Section 2 a total of four thousand dollars ($4,000); for the violations of KRS 151.250/401 KAR 4:060 Sections 2 and 3 a total of one thousand dollars ($1,000); and, finally, for the violations of KRS 224.70-110/401 KAR 5:031 Section 2(1)a total of five hundred dollars ($500).

5. The above-described civil penalties shall be paid within thirty (30) days of the entry of this Order. Payment shall be made by cashier's check, certified check, or money order, made payable to the Kentucky State Treasure. The payment shall reference on its face the captioned file numbers so that proper accounting can be made. The payment shall be mailed to the attention of "Accounts Payable," at the Office of Administrative Hearings located at 35-36 Fountain Place, Frankfort, Kentucky 40601.

6. Dan Hull is hereby **ORDERED,** within sixty days of entry of this Order or as otherwise specified herein**,** to complete all necessary remedial work required to fully abate the above violations of which he has been adjudicated to be guilty. This includes the following:

a). Immediately **CEASE** accepting any new waste material for disposal/placement until and unless a valid permit or registered permit-by-rule is obtained from the Cabinet authorizing disposal of the waste received.

b). Remove and properly dispose of all solid waste on the site/farm. This includes the four debris piles made of predominantly demolition type waste and the separate fill/land clearing wood waste, which is adjacent to Barrs Branch Creek. All of the waste must be disposed of at a permitted facility and receipts showing proper disposal of all waste must be submitted to the Cabinet's Department of Environmental Protection's (DEP's) Florence Regional Office located at 8020 Veterans Memorial Drive, Suite 110, Florence Kentucky 41041-7570.

7. Pursuant to the authority of KRS 224.10-100(10), the Secretary finds that good cause exists for further investigation to determine whether there is any ongoing discharge of human sewage from Mr. Hull's home. The Cabinet's DOW is hereby authorized to conduct further investigation of this issue, including the conducting of a dye test on Mr. Hull's plumbing, at the Cabinet's own expense, if DOW finds it is needed after further review/consideration. If determined to be needed after further review and if Mr. Hull chooses not to fully cooperate with allowing said testing to be performed, the Cabinet is authorized to seek an appropriate Order of Entry and Inspection to allow performance of said test.

8. This is a final and appealable Order.

ENTERED this the _____ day of _____, 2004.

ENVIRONMENTAL AND PUBLIC
PROTECTION CABINET

_____
LAJUANA S. WILCHER, SECRETARY

APPEAL RIGHTS

In accordance with the provisions of KRS 224.10-470 and KRS 151.186, appeals may be taken from Final Orders of the Cabinet by filing in Circuit Court a Petition for Review. Such Petition must be filed within thirty (30) days from the entry of the Final Order, and a copy of the Petition must be served upon the Cabinet.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing ORDER was, on this _____ day of _____ 200__ mailed by first-class mail, postage prepaid to:

HON DANIEL HULL
9538 BARRS BRANCH RD
ALEXANDRIA KY 41001

HON DANIEL HULL
4555 BARRS BRANCH RD
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and hand-delivered to:

HON RICHARD W. BERTELSON, III
Environmental and Public Protection Cabinet
Office of Legal Services
Fifth Floor, Capital Plaza Tower
Frankfort, KY 40601

_____
DOCKET COORDINATOR

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